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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO TRIBUNE COMPANY, ROCKWELL GRAPHIC SYSTEMS, INC.; ROCKWELL INTERNATIONAL CORPORATION; ACCO INDUSTRIES, INC.; ARROW ELECTRONICS, INC.; RYCO GRAPHIC MANUFACTURING, INC.; SIGNODE CORPORATION; and CENTRAL DATA CORPORATION,

Appellants,

vs.

J. THOMAS JOHNSON, individually and as Director, Illinois Department of Revenue; and JERRY COSENTINO, individually and as State Treasurer of Illinois; and THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Appellees.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does a State tax statute that singles out the press for a special use tax on newspaper printing presses by denying a tax exemption that has been accorded to all manufacturers save newspaper publishers for purchases of machinery and equipment acquired to manufacture tangible personal property violate the First Amendment?

2. Does such a statute discriminate against the press in violation of the Equal Protection Clause of the Fourteenth Amendment?

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On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Illinois, in No. 59453 below, filed April 19, 1985, published at 106 Ill. 2d 63, 477 N.E.2d 482 (1985), is Appendix A, *infra*. The opinion of the Appellate Court of Illinois, in No. 82-2129 in that court, published at 119 Ill. App. 3d 270, 456 N.E.2d 356 (1984), is Appendix B, *infra*. The opinion of the Circuit Court of Cook County, Illinois, in No. 80-CH-3407 in that court, is Appendix C, *infra*.

JURISDICTION

Appellants[1] were assessed Illinois use and retailer's occupation tax in respect to newspaper printing presses and related equipment that appellant the Chicago Tribune Company purchased to use in printing the *Chicago Tribune* at an extensive new facility in Chicago (called Freedom Center). These taxes were levied pursuant to an Illinois Department of Revenue regulation that denied appellants a 1979 statutory exemption from use and retailer's occupation tax that is granted for all "machinery and equipment primarily [used] in the process of the manufacturing or assembling of tangible personal property" in Illinois. The grounds for denial were that, according to the regulation, the printing of a newspaper is not "manufacturing." Appellants paid the tax under protest and brought suit in the Circuit Court of Cook County, Illinois, contending that the State's regulation was invalid because the production of a newspaper is in fact a manufacturing process. On July 19, 1982, the trial court entered judgment for the appellants, holding that they were entitled to the exemption because appellant Chicago Tribune in producing a newspaper was in fact a manufacturer of tangible personal property. The State appealed.

On November 10, 1984, the Appellate Court of Illinois reversed, holding even after the State finally conceded that the Chicago Tribune *was* engaged in a manufacturing operation that nevertheless the use tax exemption should be denied. The Appellate Court ruled that the end product — the *Chicago Tribune*, *i.e.*, the finished newspaper — had since 1961 been accorded a retail tax exemption by legislation declaring retail sale of the finished newspaper not for retail tax purposes "the sale or transfer of tangible personal property." That retail tax exemption, the Appellate Court held,

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1. Pursuant to Supreme Court Rule 28.1, appellants state that the following corporations not identified in the caption are parents, subsidiaries not wholly owned, or affiliates within the meaning of the Rule: Tribune Company; Babcock International plc; and Signode Industries, Inc.

made a newspaper non-personalty and therefore rendered purchase of machinery that produced it subject to use tax. Appellants were then granted review by the Supreme Court of Illinois; the Illinois Supreme Court, however, sustained the tax. The Court rejected appellants' arguments that the tax thus imposed unconstitutionally singled out newspaper publishers alone and not any other manufacturers of tangible personal property in Illinois.[2] Appellants filed their notice of appeal to the United States Supreme Court in the Illinois Supreme Court on July 3, 1985. (The notice of appeal is Appendix D, *infra*.)

The Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2). Cases that sustain jurisdiction can be organized under four propositions. (1) Appellants present a substantial federal question by their claim that the Illinois statutes as applied by the Illinois courts violate the First Amendment's freedom of the press clause. *Minneapolis Star & Tribune Co* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). (2) Appellants present a substantial federal question by their claim that the Illinois statutes as applied unconstitutionally

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2. Since 1970 in Illinois, pollution control equipment has been exempted from retail tax using the technique of declaring a retail sale of the product not to be a sale of tangible personal property. *See* Ill. Rev. Stat., ch. 120, par. 439.2a & 440a, as enacted, 1970. As of this date, neither the Department of Revenue nor the Illinois courts have ever taken the position that purchases of machinery and equipment to be used primarily to manufacture or assemble pollution control equipment are not entitled to the use tax exemption. A Department of Revenue regulation seems to suggest the contrary. 86 Ill. Admin. Code § 130.335(a); *see* Ill. Rev. Stat. ch. 120, par. 440, as amended, 1979. In any event, the fact that pollution control may also have been specifically singled out as an object of taxation should not mitigate the First Amendment violation that occurred here. The State may not validate an unconstitutional tax on all newspapers in Illinois by also targeting one other special and unrelated product with the same special tax. *Compare Moore* v. *City of East Cleveland*, 431 U.S. 494, 498-99 (1977), *with Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 7-9 (1974). Otherwise, a way has been created to circumvent the case law from *Grosjean* to *Minneapolis Star & Tribune*.

deny appellants equal protection of law. *Chicago Police Department* v. *Mosley*, 408 U.S. 92, 101-02 (1972); *Zobel* v. *Williams*, 457 U.S. 55, 58-65 (1982); *Trimble* v. *Gordon*, 430 U.S. 762, 766-76 (1977); see *Village Publishing Corp.* v. *North Carolina Department of Revenue*, ____ U.S. ____, 53 U.S.L.W. 3868 (June 10, 1985) (White and Brennan, Justices, dissenting from dismissal of appeal). (3) Appellants' challenge to the Illinois statutes as applied satisfies the requirement of 28 U.S.C. § 1257(2) that a case must draw into question "the validity of the statute of any state." *Xerox Corp.* v. *Harris County*, 459 U.S. 145 (1982); *Cohen* v. *California*, 403 U.S. 15 (1971); *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965). (4) The instant decision of the Illinois Supreme Court is appealable under 28 U.S.C. § 1257 as a final judgment "rendered by the highest court of a state . . . ." *North Dakota State Pharmacy Board* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159-63 (1973).

Alternatively, the Court may and should exercise certiorari jurisdiction of this case under 28 U.S.C. § 1257(3). *See* 28 U.S.C. § 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom . . . of the press.

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall . . . deprive any person of . . . property, without due process of law . . . [or] deny to any person within its jurisdiction the equal protection of the laws.

Appellant the Chicago Tribune Company challenges the constitutionality of the Illinois Use Tax Act exemption for manufacturing machinery and equipment, paragraph 439.3 (seventh subparagraph) of chapter 120 of the Illinois Revised Statutes (as amended, 1979), which provides:

> The tax imposed by this Act does not apply to the uses of machinery and equipment primarily in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease . . . ,

as construed by the Illinois Supreme Court not to apply to appellant Chicago Tribune, a newspaper publisher, in light of paragraph 439.2 (fifth subparagraph) of chapter 120 of the Illinois Revised Statutes (as enacted, 1961), which provides:

> The purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of tangible personal property.

(Appendix E, below, sets out the foregoing provisions of the Illinois Use Tax Act in context with other paragraphs of the Act.)

Appellants Rockwell Graphic Systems, Inc., et al., challenge the constitutionality of paragraph 441 (first subparagraph) of chapter 120 of the Illinois Revised Statutes (as amended, 1979), which in its effect is identical to Ill. Rev. Stat., ch. 120, par. 439.3, *supra*, as construed by the Illinois Supreme Court to deny these appellants the Illinois Retailer's Occupation Tax Act exemption for manufacturing machinery and equipment, in light of paragraph 440 (fifth subparagraph) of chapter 120 of the Illinois Revised Statutes (as enacted, 1961), which is identical to Ill. Rev. Stat., ch. 120, par. 439.2 (fifth subparagraph), *supra*. (Appendix F, below, sets out the foregoing provisions of the Illinois Retailer's Occupation Tax Act in context with other paragraphs of the Act.)

STATEMENT OF THE CASE

Beginning on January 1, 1979, the State of Illinois exempted from the State's use tax all machinery and equipment engaged in the manufacture or assembling of tangible personal property. Illinois Use Tax Act, Ill. Rev. Stat. 1981 ch. 120, ¶ 439.3, as amended, 1979. The Illinois use tax fulfills the traditional role of complementing the retailers' occupation tax by preventing avoidance of payment of state tax on purchases made outside Illinois. *United Air Lines* v. *Johnson*, 84 Ill. 2d 446, 450, 419 N.E.2d 899, 901 (1981); *Illinois Road Equipment Co.* v. *Department of Revenue*, 32 Ill. 2d 576, 580, 207 N.E.2d 425, 427 (1965).

After the legislation declaring the use tax exemption for those in Illinois engaged in the manufacturing of personalty was first enacted (in the summer of 1978), the Chicago Tribune Company disclosed plans to build a large new printing plant in Chicago that would house new printing presses and related equipment to produce the *Chicago Tribune*. (App. A, slip op. at 1a.) However, the Illinois Department of Revenue announced that it would deny the use tax exemption to all newspaper publishers on the grounds that publishers of newspapers are not engaged in "manufacturing" and therefore not entitled to the then newly enacted Illinois use tax exemption. An attempt was made during the 1979 session of the Illinois legislature to clarify who was entitled to the manufacturers' use tax exemption in Illinois. (*Id.* at 5a-6a.)

During the Illinois legislature's 1979 consideration of the issue, support was expressed in the legislature for the Department of Revenue's denial of the use tax exemption to newspaper publishers; antipathy to newspapers was also expressed. (*Id*). Moreover, during the legislative debate, the *Chicago Tribune* was specifically singled out by a legislative leader as hopefully being so impacted by a denial of the use tax exemption that the newspaper would move to another state:

> Well, it seems to me that the Department of Revenue already has the discretion, if they wish to use it, to provide this kind of an exemption for the

> Chicago Tribune, but I for one would encourage that the Chicago Tribune become the Phoenix Arizona Star. Inasmuch as I can do to encourage that, I will, and I urge opposition to Amendment No. 3.

81st Ill. Gen. Assem., Transcript of Senate Proceedings, June 19, 1979, at 50 (Sen. Rock, President Pro Tem). Still another legislator argued:

> I opposed this amendment yesterday on several bases. It . . . would help newspapers. I see no reason why we should help the newspapers out and I urge you to defeat the amendment.

Id., June 20, 1979, at 275 (Sen. Regner). The Illinois legislature in 1979 passed no clarifying legislation concerning the subject. (App. A, slip op. at 5a-6a.)

In December, 1979, the Illinois Department of Revenue adopted an "emergency rule" providing in substance "that the process of printing did not constitute manufacturing" (*id.* at 1a, *citing* 4 Ill. Reg. 99 (Jan. 4, 1980)); its "emergency rule" subsequently became a permanent rule. (App. A, slip op. at 1a, *citing* 6 Ill. Admin. Code, sec. 130.330(b)(5)). Thereupon, the Illinois Department of Revenue claimed that the Chicago Tribune was liable for use tax on all of the substantial purchases of presses and other equipment that were being installed at Freedom Center. (App. A, slip op. at 1a-2a.) The total amount of the tax claimed against the Chicago Tribune was $2,286,285.04.[3]

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3. Some of this amount was collected from the Chicago Tribune indirectly through appellants Rockwell Graphic Systems, Inc. *et al.*, for retailers' occupation tax on sales of newspaper presses and related equipment to the Chicago Tribune within Illinois. Those appellants claimed that such sales were entitled to a manufacturing exemption found in the Retailer's Occupation Tax Act identical to the use tax exemption. Ill. Rev. Stat., ch. 120, ¶ 441, as amended, 1979. Those appellants likewise paid the tax under protest and then intervened with the Chicago Tribune as plaintiffs below. For simplicity, this Jurisdictional Statement focuses on the use tax paid directly by the Chicago Tribune.

The Chicago Tribune paid the use tax under protest and filed a Complaint in the Circuit Court of Cook County, Illinois. The Tribune's Complaint contended that the Department of Revenue's regulation was invalid because the printing of a newspaper is in fact a manufacturing process; the Tribune accordingly urged that its new printing presses and equipment were entitled to the use tax exemption. (*Id.* at 2a.) An extensive trial ensued and, as a part of the trial proceedings, the Circuit Judge even viewed the newspaper presses while they were operating. (Tr. 1-44.)[4] The Circuit Court then found and decreed that the preparation of a newspaper from the component products of newsprint and ink is in fact a manufacturing process, that the Department's regulation was invalid as conflicting with the Illinois use tax exemption statute, and that newspaper publishers as manufacturers were entitled to the use tax exemption. (App. A, slip op. at 2a; App. C.)

The State of Illinois appealed to the Appellate Court of Illinois (the State's intermediate appeals court). (App. A, slip op. at 2a.) In that appeal, the State totally abandoned its contention that newspaper publishers were not manufacturers and conceded for the first time that the Chicago Tribune in producing the newspaper was engaged in manufacturing; almost all of the trial proceedings in the Circuit Court thus were mooted. (*Id.*) Nevertheless, the State continued to contend that the Chicago Tribune should be denied the use tax exemption. The Department of Revenue made the new contention in the Appellate Court that the end product — the finished newspaper — had since 1961 been accorded retail tax exemption in Illinois and therefore a use tax exemption on

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4. Citations to the trial record are abbreviated herein as follows: "C" followed by a number refers to the page in the record so stamped; "Tr." followed by a number refers to the page in the transcripts of the Chicago Tribune facilities site tour and the trial transcript (which together bear the single "C" number C 544) bearing the same separate number; "PX" denotes Plaintiffs' Exhibit(s).

newspaper presses should be denied.[5] Illinois had granted the finished newspaper an exemption from retail tax by the legislative technique of declaring that the sale or transfer of the finished newspaper was not a sale or transfer of tangible personal property for tax purposes. (*Id.* at 2a-3a.) The State urged to the Illinois Appellate Court that, because the Illinois retail tax statute had for that tax declared since 1961 that newspapers were not "tangible personal property" (*id.* at 3a), the manufacturing use tax exemption was not intended to be accorded to newspapers; the use tax exemption provided that only manufacturers of "tangible personal property" were entitled to the exemption. (*Id* at 2a.)

The Appellate Court of Illinois adopted the State's position and imposed the use tax on appellants, ruling that the Chicago Tribune and all other newspapers were not manufacturing "tangible personal property." (App. B.) Newspapers in Illinois thus became the only manufacturers of what is in fact tangible personal property that have in fact been required to pay use tax on their purchases of machinery and equipment.[6]

The Illinois Supreme Court, the court below, granted an appeal from the decision in favor of the State but then sustained the result of the Appellate Court. The Illinois Supreme Court likewise ruled that newspaper publishers can be

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5. The state of the record on this issue prior to that point is summarized by the opinion of the Appellate Court (App. B, slip op. at 14a):

> Before discussing the merits of this argument, we must consider the plaintiff's contention that the defendant Department of Revenue admitted in the trial court that individual *Chicago Tribunes* are tangible personal property. This assertion is based on a letter from the Chief of the Revenue Litigation Division of the Attorney General's office. This letter stated in relevant part that "this office is prepared at this time to stipulate only to paragraphs 1 through 4 and 43 through 50 of your proposed draft [stipulation]." Paragraph 50 of the proposed stipulation provided that "[e]ach item of machinery and equipment purchased by Tribune . . . is used primarily in the production of *Chicago Tribunes*, which are tangible personal property."

The Court ruled a binding stipulation had not been reached. *Id.*

6. *See* note 2, *supra*.

assessed use tax for their out-of-state equipment purchases while other manufacturers are not. (App. A.) The opinion holds, as did the Appellate Court, that the Chicago Tribune is subject to use tax: the use tax exemption only extends to the manufacturer of tangible personal property and the finished newspaper manufactured in Illinois is not tangible personal property because of the wording of the State's retail sales tax statutory exemption granted to the finished newspaper. (*Id.* at 3a-5a.)

A dissenting Justice of the Illinois Supreme Court declared:

> There is no doubt, however, that newspapers fall within the category of tangible personal property as that term is commonly understood, just as books and paintings do. For example, a person who owns a copy of the famous *Tribune* headline declaring Thomas E. Dewey the victor in the 1948 presidential election would certainly regard it as a valuable piece of tangible personal property.
>
> The fact that the legislature has decided in another provision that the sale of newspapers should not be subject to a tax does not change a newspaper from "tangible personal property" as that term is used in the manufacturing-machinery exemption into something else . . . .
>
> The purpose of the [earlier] provision was only to exclude newspapers from taxation as retail sales by the device of declaring that such a transfer is not a sale of personal property. Nothing in the wording of this exemption either commands or justifies its application as a definition of "tangible personal property" which excludes newspapers wherever that term is used in the tax statutes.

(*Id.* at 8a-9a.)

The Illinois Supreme Court's decision approves the result that newspaper publishers but no other manufacturers of tangible personal property in Illinois pay use tax on their out-of-state machinery and equipment purchases.[7] Nevertheless, the Illinois Supreme Court ruled that the singling out of newspapers for a use tax on their purchases of printing presses and other equipment was constitutionally permissible under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment:

> The Tribune argues . . . that the imposition of the tax violates the freedom which is assured the press by the first amendment to the Constitution of the United States. It contends that its situation is identical to the one considered in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue* (1983), 460 U.S. 575 . . . , where the Supreme Court invalidated a use tax . . . .
>
> The tax in *Minneapolis Star* was limited to publications; *the use tax here applies to all tangible personal property, including printing presses.* Printing presses have been subject to the use tax since the tax statute was enacted in 1955. (1955 Ill. Laws 2027.) *The legislature's decision in 1979 to exempt certain machinery from the tax* to encourage the State's industrial development *did not render the tax statute unconstitutional when applied to printing presses* for the years 1979-81.

(*Id.* at 6a-7a (emphasis added).)

> The Tribune says that the State may not tax its machinery differently from that of other "manufacturers." Newspaper publishers *differ from other manufacturers* because the legislature has made their product, newsprint, not subject to the retailers' occupation tax and use tax. Thus, they enjoy a bene-

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7. *Id.* The Illinois Supreme Court opinion plainly *sub silentio* assumes newspaper publishers alone may be singled out to pay the tax.

> fit that other manufacturers have not been given. The purpose of the exemption is to attract new manufacturing facilities to our State and to discourage existing ones from relocating outside Illinois. (See 81st Ill. Gen. Assem., Transcript of Senate Proceedings, June 19, 1979, at 49.) There is a rational relationship between the scope of the manufacturing-machinery exemption and the purpose for which it was enacted.

(*Id.* at 6a (emphasis added).)

In 1981, after the use tax was levied upon the Chicago Tribune by the State, clarifying legislation was passed in Illinois so that, at this time, unless there is still another change in Illinois legislation, purchases of equipment for use in all printing activities — including newspaper publishing — will clearly enjoy a like exemption. (*Id.* at 3a.) The exempting language of the statutes, Ill. Rev. Stat., ch. 120, par. 439.3 & 441, as amended, 1981, appears in Appendix G, below.

THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED IN THE CASE ARE SUBSTANTIAL

INTRODUCTION

Appellant the Chicago Tribune Company, the largest newspaper publisher in Illinois,[8] constructed an extensive new printing plant in Chicago and made substantial purchases of presses and other equipment to manufacture its newspapers in that facility. Appellant's purchases of capital equipment then were denied the Illinois use tax exemption granted to other manufacturers of personalty in Illinois;[9] the ground for denying appellant the exemption was solely that appellant manufactured a newspaper. Indeed, the very same equipment that appellant has purchased to print the *Chicago Tribune*, if used instead for the manufacture of books, wrapping paper, or wallpaper — or even to print advertising pamphlets on newsprint — would indisputably be exempt from the Illinois use tax, since every other manufacturer except a newspaper publisher that purchases production equipment is accorded an exemption from use tax.

A statute that targets newspaper publishers alone for taxation because they are newspaper publishers is facially infirm as an impermissible restraint upon secured First Amendment rights. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *see Village Publishing Corp.* v. *North Carolina Department of Revenue*, ____ U.S. ____, 53 U.S.L.W. 3868 (White and Brennan, Justices, dissenting from dismissal of appeal) (June 10, 1985); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). The State bears a heavy burden to justify such a tax. *Speiser v. Randall, supra*, 357 U.S. at 520; *Murdoch* v. *Pennsylvania*, 319 U.S. 105, 110-13 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296, 305-07 (1940). The slip opinion and all the proceedings below disclose that the State not only did not meet the burden of justifying taxation of newspapers specially but also that its proffered justification — that the tax is

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8. Editor & Publisher International 1985 Yearbook, page I-88.

9. *See* note 2, *supra*.

a trade-off for the retail exemption on the finished newspaper — is totally inconsistent with this Court's most recent decision concerning taxation of newspapers. *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). The Court should strike down the Illinois use tax imposed on the Chicago Tribune and condemn this effort by Illinois to specially tax the press.

I. THE FIRST AMENDMENT PROHIBITS THE ILLINOIS TAX

A. Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue

The Court's recent decision in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, *supra*, 460 U.S. 575, is so "on all fours" with this case that it is hard not to suspect that Illinois in its quest for revenue has a myopic disregard of the Court's 1983 decision. In the *Minneapolis Star & Tribune* decision, the Court held unconstitutional a "use tax" on the cost in excess of $100,000 annually of paper and ink components consumed in the production of a "periodic" publication, *i.e.*, a newspaper or magazine. *Id.* at 576-79. Retail sales of newspapers in Minnesota were exempt from Minnesota sales tax since they were within the ambit of the tax exemption granted to periodic publications. *Id.* at 577. Thus, in Minnesota only a newspaper's ink and paper purchases (but not such purchases of other manufacturers who use paper and ink) became subject to Minnesota's use tax once purchases crossed over the $100,000 threshold. *Id.* at 577-78. And, because of the $100,000 exemption, only a very few newspapers suffered the burden of this tax. *Id.* at 578.

In the instant case, too, only the newspaper publishers' purchases (of manufacturing equipment) have been subject to use tax[10] and here, too, the tax was in fact visited only upon a select few. Indeed, the sequence of events here — first denying the exemption to newspaper publishers as not being

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10. *Id.*

manufacturers (with the hope by members of the legislature that the tax consequence to the Chicago Tribune would be harsh); second, after trial proceedings, grudgingly conceding the reality that newspaper publishers are manufacturers but then claiming that publishers do not manufacture tangible personal property when they produce a newspaper; and then, third, after the machinery and equipment for Freedom Center is taxed, passing legislation that exempts newspapers (*see* section I.B., *infra*) — suggests that the assessment was targeted primarily to one publisher.

The Court in 1983 rejected Minnesota's argument that its challenged tax was valid as part of a general scheme of taxation, holding that in the context there presented the "paper and ink" use tax was facially discriminatory. *Id.* at 581. The Court looked at the ultimate result in Minnesota, *i.e.*, a tax solely on publications. Illinois has defended its use tax here by adopting precisely the same argument, *i.e.*, that the use tax and its manufacturing exemption for those who manufacture personalty is claimed to be part of a general scheme of taxation. Yet newspapers alone among manufacturers in Illinois are in fact visited with the use tax on their out-of-state purchases of capital equipment. *Id.* The Court in *Minneapolis Star & Tribune* found that paper and ink use tax to be unconstitutional as a special tax on newspapers. *Id.* at 581, 591-93. We believe that the Illinois use tax is equally infirm as a special tax on newspaper presses. *Id.* at 581-93; *and see Speiser* v. *Randall, supra*, 357 U.S. at 518 (denial of property tax exemption to persons who did not carry burden of showing loyalty to government violated due process).

The Court in the *Minneapolis Star & Tribune* case also rejected the contention that the special use tax could be justified as a substitute for the sales tax from which Minnesota had exempted the sale of newspapers. 460 U.S. at 586-90. Nevertheless, Illinois seeks to justify its use tax here on precisely the same ground as Minnesota; indeed, the opinion below specifically holds that the retail tax exemption granted to the sale of the newspaper constitutionally justifies the sep-

arate tax classification of the manufacturing equipment purchases of newspapers. (App. A, slip op. at 6a.) In rejecting such a "trade-off rationale," the Court in *Minneapolis Star & Tribune* stated:

> Further, even assuming that the legislature did have valid reasons for substituting another tax for the sales tax, we are not persuaded that this tax does serve as a substitute. The State asserts that this scheme actually *favors* the press over other businesses, because the same rate of tax is applied, but, for the press, the rate applies to the cost of components rather than to the sales price. We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise of [First Amendment] rights almost as potently as the actual application of sanctions." . . .
>
> A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the

> heart of the First Amendment, and we cannot tolerate that possibility.

460 U.S. at 588-90 (emphasis added).[11]

So, also, the dissent below demonstrates (as does common experience) that it is sophistry to declare that a newspaper is not tangible personal property in order to justify a tax on the newspaper. A state may not obviate First Amendment requirements by irrebutably attributing to a newspaper nonexistent characteristics, properties or definitions that are contrary to reality. *See Stanley* v. *Illinois*, 405 U.S. 645, 656-58 (1972); *Vlandis* v. *Kline*, 412 U.S. 441, 451-52 (1973). The Illinois Supreme Court's reliance upon the transparently counterfactual proposition that a newspaper is not personalty to sustain the tax below is a constitutionally impermissible technique that should be forthwith condemned by this Court before it spawns all sorts of illegal progeny. *See New York Times Co.* v. *Sullivan*, 376 U.S. 256, 269 (1964) (this Court is not bound by "mere labels" of state law).

And, finally, this Court in scrutinizing the revenue-gathering actions of Minnesota noted (albeit the Minnesota tax nevertheless was ruled unconstitutional) that there was no evidence of any intent by Minnesota to deliberately harm or prejudice newspapers in the plan of taxation. 460 U.S. at 591-92. The legislative history in Illinois suggests that the Illinois enactment is not entitled to the same presumption; the whole taxing procedure below is suspect in light of both the legislative debate and the ensnaring of the Chicago Tribune in a two-year tax window. The Illinois Supreme Court, albeit relying in its opinion upon these debates to construe the use tax statute language to deny an exemption to newspapers, never considered that history in ruling upon the First Amendment issues.

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11. In a footnote, the Court noted that since newspapers receive a substantial portion of their revenues from advertising it is not necessarily true that the price of the finished product will exceed the cost of the components. 460 U.S. at 590 n.14.

B. The 1981 Illinois Legislative Amendment

As noted above and in the slip opinion, Illinois in 1981, after visiting the use tax upon the Chicago Tribune, corrected its unconstitutional taxing scheme. (App. A, slip op. at 3a.) Presumably today the very same purchases by the Chicago Tribune would be granted the use tax exemption for manufacturers of personalty because the exemption is now accorded to all graphic arts industries, including newspapers (unless the statute is again amended, possibly in anticipation of substantial purchases by another newspaper publisher).

We believe:

(a) That the subsequent legislation now granting the use tax exemption to newspaper publishers heightens the impermissible result here. The Chicago Tribune, Illinois' largest newspaper publisher, may well have been specially taxed for building and equipping one of the largest newspaper printing facilities ever constructed in Illinois. A sequence of state acts and maneuvers could appear in retrospect to have been designed to tax one of the state's most widely circulated newspapers. The First Amendment cannot tolerate the stratagem of deliberately singling out and specially disadvantaging publications that may be disliked by state officials. *See Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

As this Court said in the *Minneapolis Star & Tribune* case:

> Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax . . . . Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few

> members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

460 U.S. at 591. The singling out of a newspaper or small group of them was in that case presumed to be a good-faith constitutional error; the same presumption cannot be enjoyed by Illinois. The tax here strikes at the core of First Amendment values.

(b) If the Court does not void the action below, then Illinois has been allowed to engage in newspaper taxation upon a justification rejected by this Court in 1983, *i.e.*, that another aspect of the taxpayer's activity (the sale of the newspaper) has been tax exempted and therefore the imposition of the use tax here is part of a "trade-off." That interpretation of Justice O'Connor's opinion in the *Minneapolis Star & Tribune* case is such a complete misreading and distortion as to

justify the Court's hearing this case to discourage any further studied avoidance of that decision.[12]

II. THE ILLINOIS TAX VIOLATES EQUAL PROTECTION

Aside from the First Amendment, we believe Illinois has also done violence to the Equal Protection Clause of the Fourteenth Amendment. Singling out of newspaper publishers for special taxation is highly suspect if not *per se* imper-

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12. We set out in parallel the language of the Illinois Supreme Court below and Justice O'Connor's language in the *Minneapolis Star & Tribune* case since it reveals no obedience to this Court's 1983 opinion:

Newspaper publishers differ from other manufacturers because the legislature has made their product, newsprint, not subject to the retailers' occupation tax and use tax. Thus, they enjoy a benefit that other manufacturers have not been given. . . . *There is a rational relationship between the scope of the manufacturing-machinery exemption and the purpose for which it was enacted.* . . .

(App. A, slip. op. at 6a (emphasis added).)

The tax is, according to the State, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press. . . . If the real goal of this tax is to duplicate the sales tax, it is difficult to see why the State did not achieve that goal by the obvious and effective expedient of applying the sales tax.

. . . We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the *possibility* of subsequent differentially *more burdensome* treatment.

460 U.S. at 586-88 (emphasis added).

missible because it impinges on the fundamental rights inherent in freedom of the press. *See Chicago Police Department* v. *Mosley*, 408 U.S. 92, 101-02 (1972). Absent proof of a compelling state interest, no discrimination against newspapers that makes them the sole manufacturers in the State to pay use tax for their machinery and equipment can be justified. *Id.*

As noted earlier (*see* page 13 above), book publishers, producers of wallpaper and wrapping paper, and all other manufacturers of printed products have been excused from the tax as have been the manufacturers of every other tangible product. However, as the trial court record shows, and as the State finally *conceded* on appeal below, the use at Freedom Center of the Chicago Tribune's printing presses taxed here cannot be distinguished from any other manufacturing operation in Illinois or elsewhere.

The opinion below attempts to justify the singling out of newspaper publishers by a reference to the policy of encouraging purchase and use in Illinois of new capital equipment. Considerations of encouraging the purchase of new equipment apply to the newspaper publishing business as much as to any other industry. Thus, in effect, Illinois has created a distinction where no difference exists. Accordingly, the tax here lacks a rational basis and cannot withstand constitutional scrutiny. *Zobel* v. *Williams*, 457 U.S. 55, 58-65 (1982); *see Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue, supra*, 460 U.S. at 585-89; *Village Publishing Corp.* v. *North Carolina Department of Revenue, supra*, 53 U.S.L.W. 3868.

Plainly, the Illinois statute, as interpreted by the state courts, cannot possibly fulfill a compelling state interest and hence infringes impermissibly on fundamental First Amendment freedoms. *See e.g., Chicago Police Department* v. *Mosley, supra*, 408 U.S. at 101-02; *Trimble* v. *Gordon*, 430 U.S. 762, 766-76 (1977). *Also see Halberstadt* v. *Harris Trust & Savings Bank*, 55 Ill. 2d 121, 128, 302 N.E.2d 64, 68 (1973); *Hearst Corp. (News American Division)* v. *State Depart-*

ment of Assessments and Taxation, 269 Md. 625, 308 A.2d 679 (1973).

The Illinois use tax imposed here thus offends the Equal Protection Clause as well as the First Amendment.

CONCLUSION

We respectfully suggest the Court should now note probable jurisdiction and, after hearing, reverse.

Respectfully submitted,

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Dated: July 16, 1985

APPENDICES

APPENDIX A

Docket No. 59453 — Agenda 19 — September 1984.

CHICAGO TRIBUNE COMPANY *et al.*, Appellants, v. J. THOMAS JOHNSON, Indiv. and as Director of Revenue, *et al.*, Appellees.

JUSTICE WARD delivered the opinion of the court:

On July 19, 1982, the circuit court of Cook County held that the plaintiff, the Chicago Tribune Company (the Tribune), was exempt from liability under provisions of the Use Tax Act (Ill. Rev. Stat. 1981, ch. 120, par. 439.1 *et seq.*) on its purchase of machinery for a new printing facility. The appellate court reversed (119 Ill. App. 3d 270), and we granted the Tribune's petition for leave to appeal under Rule 315 (87 Ill. 2d R. 315).

On September 9, 1979, the Tribune announced the beginning of construction on its new printing facility in Chicago, which was to be known as the "Freedom Center." In that year, amendments to the Use Tax Act and to the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1981, ch. 120, par. 440 *et seq.*) created an exemption for "machinery and equipment primarily [used] in the process of the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease . . . ." (Ill. Rev. Stat. 1981, ch. 120, par. 439.3; Ill. Rev. Stat. 1981, ch. 120, par. 441.) In December 1979, the Department of Revenue (the Department) made public a proposed regulation which in substance provides that the process of printing did not constitute manufacturing, and that therefore a purchase of printing machinery would not qualify for the "manufacturing machinery" exemption under the Use Tax Act and the Retailers' Occupation Tax Act. The proposed regulation was adopted on December 21, 1979, as an emergency rule (4 Ill. Reg. 99 (Jan. 4, 1980)), and later became a permanent regulation (86 Ill. Admin. Code sec. 130.330(b)(5)). Relying on the regulation, the Department claimed that the Tribune was liable for tax on the purchases of the printing presses and equipment that had been installed

at the Freedom Center. The Tribune filed a complaint for "Injunction, Declaratory Judgment and Damages" in the circuit court of Cook County, asserting a right to the manufacturing-machinery exemption. In the interim, the Tribune paid the amount claimed under the disputed tax into a protest fund established by the circuit court.

The Tribune alleged in its complaint that it was engaged in "manufacturing." Much of the evidence introduced at the hearing described the operation of the Freedom Center. As stated, the court held that the Tribune's presses and equipment qualified for the sales and use tax exemption for manufacturing machinery and equipment.

In the appellate court, the Department abandoned its contention that pursuant to the regulation the presses were not considered as manufacturing machinery. Rather, the Department argued that printing presses did not produce "tangible personal property," and therefore the presses were not "machinery and equipment primarily [used] in the process of the manufacturing or assembling of tangible personal property . . . ." (Ill. Rev. Stat. 1981, ch. 120, par. 439.3.) The appellate court held that the Tribune's printing presses and equipment did not qualify for the manufacturing-machinery exemption and reversed the trial court.

The Retailers' Occupation Tax Act (Ill. Rev. Stat. 1981, ch. 120, par. 440 *et seq.*) taxes the occupation of selling tangible personal property at retail. (*Illinois Cereal Mills, Inc.* v. *Department of Revenue* (1983), 99 Ill. 2d 9, 17.) The Use Tax Act (Ill. Rev. Stat. 1981, ch. 120, par. 439 *et seq.*) taxes the privilege of using tangible personal property within the State. (*United Air Lines, Inc.* v. *Johnson* (1981), 84 Ill. 2d 446, 449.) Functionally, the Use Tax Act serves to tax property purchased out of State by Illinois residents that is not taxable under the Retailers' Occupation Tax Act or the tax act of another State. The Use Tax Act thus prevents the avoidance of the Retailers' Occupation Tax Act and at the same time attempts to eliminate the competitive disadvantage of in-State businesses. *United Air Lines, Inc.* v. *Johnson* (1981), 84

Ill. 2d 446, 450; *Illinois Road Equipment Co.* v. *Department of Revenue* (1965), 32 Ill. 2d 575, 580; *Turner* v. *Wright* (1957), 11 Ill. 2d 161, *appeal dismissed* (1957), 355 U.S. 65, 2 L. Ed. 2d 106, 78 S. Ct. 140.

In 1961, the legislature amended the Use Tax Act and the Retailers' Occupation Tax Act by adding a provision which had the effect of exempting newspapers and periodicals from the taxes:

> "The purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of tangible personal property." (Ill. Rev. Stat. 1981, ch. 120, par. 439.2; Ill. Rev. Stat. 1981, ch. 120, par. 440.)

In 1979, the Retailers' Occupation Tax Act and the Use Tax Act were amended to add the described exemption for manufacturing machinery which is involved here. (Ill. Rev. Stat. 1981, ch. 120, par. 439.3; Ill. Rev. Stat. 1981, ch. 120, par. 441.) In 1981, the legislature enacted the "graphic-arts" amendment to the two acts, which exempted from taxation graphic-arts machinery and equipment, both new and used, including that equipment manufactured on special order, certified by the purchaser to be used primarily for graphic-arts production. (Ill. Rev. Stat. 1981, ch. 120, par. 439.3; Ill. Rev. Stat. 1981, ch. 120, par. 441.) The parties agree that, through the graphic-arts amendment, printing presses are exempt from the retailers' occupation tax and use tax. The issue we must decide is whether the Tribune, before the graphic-arts amendment took effect, was entitled to the benefit of the manufacturing-machinery exemption.

The Department contends that the amendment, which exempts newsprint from the retailers' occupation tax and use tax, requires that newsprint, in legal effect, no longer be considered tangible personal property. Consequently, it says that printing presses do not qualify for the manufacturing-

machinery exemption because the exemption is only for machinery that manufactures or assembles tangible personal property. The Tribune argues that the printing process constitutes the manufacturing of tangible personal property. It says that the meaning of "tangible personal property" is clear, and that in determining what constitutes "machinery . . . primarily [used] in the process of the manufacturing . . . of tangible personal property," the customary understanding of tangible personal property should be used. The Tribune contends, too, that the imposition of the tax would violate the first amendment and the equal protection clause of the fourteenth amendment of the Constitution of the United States.

It is of course fundamental that in statutory construction a court will seek to determine the legislative intendment. (*People* v. *Beam* (1979), 74 Ill. 2d 240, 242; *People* v. *Savaiano* (1976), 66 Ill. 2d 7, 15; *People* v. *Scott* (1974), 57 Ill. 2d 353, 358.) The legislative history or background of a statute may be instructive in ascertaining the intent of the legislature. (*People ex rel. Hanrahan* v. *White* (1972), 52 Ill. 2d 70, 73; *Bergin* v. *Board of Trustees* (1964), 31 Ill. 2d 566, 573; *People* v. *Boykin* (1982), 109 Ill. App. 3d 112, 115.) It is appropriate to do so here to determine whether the legislature, in light of the newsprint exemption, intended that printing presses were to be considered "machinery . . . primarily [used] in the process of the manufacturing . . . of tangible personal property."

The legislative background of the manufacturing-machinery exemption indicates that printing presses were not intended to be included in the exemption. House Bill 1596 was introduced to clarify a number of ambiguities in the manufacturing-machinery exemption. (See 81st Ill. Gen. Assem., Transcript of House Proceedings, June 29, 1979, at 235.) When House Bill 1596 was received in the Senate, an amendment to it was proposed which would have added a provision that exempted "press equipment designed and used for producing newspapers or other periodicals that have the

primary purpose of disseminating news to the public." (81st Ill. Gen. Assem., Transcript of Senate Proceedings, June 19, 1979, at 47.) During the debate on the suggested amendment in the Senate, Senator Regner observed:

> "What [the proposed amendment] does, it provides a tax incentive for printing equipment. It would help the newspapers. I see no reason why we should help the newspapers out and I urge you to defeat the amendment." (81st Ill. Gen. Assem., Transcript of Senate Proceedings, June 20, 1979, at 275.)

This indicates that the intention had not been to exempt news printing presses at the time the manufacturing-machinery exemption was enacted. The proposed amendment, which would have exempted newspaper printing presses, was defeated by a vote of 23 to 3. (81st Ill. Gen. Assem., Transcript of Senate Proceedings, June 20, 1979, at 275.) Later in the House, Representative Flinn, sponsor of House Bill 1596, stated that he had "refused to permit the Senate to put on the printer's amendment." (81st Ill. Gen. Assem., Transcript of House Proceedings, June 29, 1979, at 238.) Debates on the graphic-arts amendment also confirm that the legislative intent had not been to exempt presses. Representative Bowman, in unsuccessful opposition to the graphic-arts bill, commented:

> "Ladies and Gentlemen of the House, we are being eaten alive by the manufacturers sales tax exemption as it is and this would expand that exemption by 22.4 million dollars in fiscal year 83." (82nd Ill. Gen. Assem., Transcript of House Proceedings, July 1, 1981, at 204.)

The reference to the proposed expansion of the manufacturing machinery exemption to include printing presses, of course, indicates that, as of then, they were not within the exemption.

The Tribune makes two constitutional claims. We observe initially that "a statute enjoys a strong presumption

of constitutionality [citation], and the burden of showing invalidity is on the party challenging the enactment." (*People* v. *La Pointe* (1981), 88 Ill. 2d 482, 499.) It is contended that the imposition of the tax would violate the equal protection clause of the fourteenth amendment (U.S. Const., amend. XIV). The Tribune says that the State may not tax its machinery differently from that of other "manufacturers." The equal protection analysis relevant here is whether there exists a rational relationship between the classification and the purpose for which it was enacted. (See *Allied Stores* v. *Bowers* (1959), 358 U.S. 522, 526-27, 3 L. Ed. 2d 480, 484-85, 79 S. Ct. 437, 440-41; *Fiorito* v. *Jones* (1968), 39 Ill. 2d 531; J. Nowak, R. Rotunda & J. Young, Constitutional Law 361-65 (1978). In articulating the constitutional requirements for tax exemptions, the court in *Fiorito* v. *Jones* (1968), 39 Ill. 2d 531, first recognized that "the legislature has broad power to establish reasonable classifications in defining subjects of taxation." (39 Ill. 2d 531, 535.) In exercising this power, the legislature "may define a general class which is subject to an occupation tax and then specifically remove a subclass." (39 Ill. 2d 531, 535.) Those classifications, however, "must be based upon real and substantial differences between persons taxed and those not taxed [citation], and they must bear some reasonable relationship to the object of the legislation [citation], or to public policy." (39 Ill. 2d 531, 535-36.) Newspaper publishers differ from other manufacturers because the legislature has made their product, newsprint, not subject to the retailers' occupation tax and use tax. Thus, they enjoy a benefit that other manufacturers have not been given. The purpose of the exemption is to attract new manufacturing facilities to our State and to discourage existing ones from relocating outside Illinois. (See 81st Ill. Gen. Assem., Transcript of Senate Proceedings, June 19, 1979, at 49.) There is a rational relationship between the scope of the manufacturing-machinery exemption and the purpose for which it was enacted.

The Tribune argues, too, that the imposition of the tax violates the freedom which is assured the press by the first

amendment to the Constitution of the United States. It contends that its situation is identical to the one considered in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue* (1983), 460 U.S. 575, 75 L. Ed. 2d 295, 103 S. Ct. 1365, where the Supreme Court invalidated a use tax. But the tax there was specifically directed at newspapers and other publications. It was a use tax on publications based on the cost of paper and ink "consumed in the production of a publication." Though the tax rate was lower than that of the general use tax from which newspapers were exempt, the court held that because the tax was enacted exclusively for newspapers, it created a censorial threat in violation of the first amendment.

The tax in *Minneapolis Star* was limited to publications; the use tax here applies to all tangible personal property, including printing presses. Printing presses have been subject to the use tax since the tax statute was enacted in 1955. (1955 Ill. Laws 2027.) The legislature's decision in 1979 to exempt certain machinery from the tax to encourage the State's industrial development did not render the tax statute unconstitutional when applied to printing presses for the years 1979-81. The enactment of the graphic-arts amendment in 1981 did not affect the constitutionality of the previous tax scheme in which the presses were subject to tax, anymore than the exemption of newsprint in 1961 rendered the previous taxation of newsprint unconstitutional.

For the reasons given, the judgment of the appellate court is affirmed, and the cause is remanded to the circuit court for further proceedings not inconsistent with this opinion.

Affirmed and remanded.

JUSTICE SIMON, dissenting:

I believe the majority's conclusion is inconsistent with the plain meaning of the applicable use and sales taxes. It is clear that printing presses are machinery and equipment primarily used in the process of manufacturing or assembling,

and they therefore meet the first definitional requirement for the manufacturing-machinery exemption. In fact, as the majority points out, the revenue department has abandoned its original position that printing presses are not manufacturing machinery. It has also abandoned its reliance on its emergency rule adopted on December 21, 1979, which later became a permanent regulation, that manufacturing does not include the process of printing.

This would end the case, and the manufacturing-machinery exemption would relieve the taxpayer of the contested use tax, had the revenue department not shifted its position during the course of this litigation to argue that the exemption does not apply because a newspaper is not "tangible personal property for wholesale or retail sale" within the meaning of this provision. There is no doubt, however, that newspapers fall within the category of tangible personal property as that term is commonly understood, just as books and paintings do. For example, a person who owns a copy of the famous *Tribune* headline declaring Thomas E. Dewey the victor in the 1948 presidential election would certainly regard it as a valuable piece of tangible personal property.

The fact that the legislature has decided in another provision that the sale of newspaper should not be subject to a tax does not change a newspaper from "tangible personal property" as that term is used in the manufacturing-machinery exemption into something else. The language used in the two provisions is different; hence, there is no valid basis for concluding that because newspapers are specifically exempted from the sales tax, they are also excluded from the term "tangible personal property" as used in the manufacturing-machinery exemption. The latter exemption by its terms applies to the "manufacturing or assembling of tangible personal property *for wholesale or retail sale or lease*." (Emphasis added.) (Ill. Rev. Stat. 1979, ch. 120, par. 439.3.) The provision exempting the sale of newspapers, on the other hand, first refers to newsprint and ink as "tangible personal property" and then exempts the purchase of "newsprint and

ink for the primary purpose of conveying news" by directing that such a transfer "*is not a purchase, use or sale of tangible personal property.*" (Emphasis added.) Ill. Rev. Stat. 1981, ch. 120, par. 440.

The purpose of the latter provision was only to exclude newspapers from taxation as retail sales by the device of declaring that such a transfer is not a sale of personal property. Nothing in the wording of this exemption either commands or justifies its application as a definition of "tangible personal property" which excludes newspapers wherever that term is used in the tax statutes. Moreover, the use of different language surrounding that term suggests it has different meanings in the two contexts. Reading into the manufacturing-machinery exemption the dissimilar language of the newspaper-sales exemption leads to a construction of the former provision which is contrary to its plain meaning. The newspaper-sales exemption confers upon newspapers a status that is, of course, contrary to reality. It is illogical and unwarranted to carry that status over to another provision adopted 18 years later, designed for a different purpose, dealing with different subject matter and using the term "tangible personal property" in a completely different context, absent a clear directive from the legislature.

I find nothing irregular or unacceptable in a taxing scheme that exempts newspapers from a sales tax while at the same time exempting the printing presses that produce them from a use tax. That is the legislature's prerogative and, as I read the statutory provisions, it has expressed that choice in clear and unambiguous language.

Because the statutory provisions applicable here are clear and unambiguous, they should be given effect without resort to other aids for construction. (*People* v. *Robinson* (1982), 89 Ill. 2d 469, 475-76.) It is therefore improper to consider the statements of two members of the general assembly referring to a defeated amendment to House Bill 1596 to determine whether the legislature intended that printing presses qualify for the manufacturing-machinery exemption.

The statutory language itself is the best indication of the intent of the drafters. (89 Ill. 2d 469, 475.) In any event, the statements on which the majority relies do not indicate any legislative intent, and thus neither require the interpretation of the manufacturing-machinery exemption which the majority applies nor even lend support to that interpretation.

As the majority points out, the defeated amendment would have added a provision to the manufacturing-machinery exemption covering "press equipment designed and used for producing newspapers or other periodicals that have the primary purpose of disseminating news to the public." (Slip op. at 4.) There is no certainty, however, that the observations of Senator Regner and Representative Flinn express what motivated the majority of the senators who voted against the amendment. Those who voted "against" may have done so believing the amendment unnecessary because the manufacturing-machinery exemption clearly included news printing presses. Representative Bowman's statement in opposition to the graphic-arts bill is also inconclusive, for if printing presses were already included in the manufacturing-machinery exemption, they could hardly contribute to the expansion of the exemption to which Representative Bowman was referring.

Moreover, the enactment of the graphic-arts bill does not support the conclusion that it provided an exemption for printing presses which did not previously exist. The graphic-arts amendment (Ill. Rev. Stat. 1981, ch. 120, par. 439.3) was enacted in the next session of the legislature after the revenue department adopted its emergency rule on December 21, 1979, which later became a permanent regulation, declaring that printing machinery did not qualify for the manufacturing-machinery exemption. Under these circumstances, the graphic-arts bill should be regarded as interpretive and a reaffirmation of existing legislation, designed to correct an erroneous administrative interpretation placed on the statute by the revenue department. (*Bruni* v. *Department of Registration & Education* (1974), 59 Ill. 2d 6, 11-12; *People ex rel.*

Spitzer v. *County of LaSalle* (1960), 20 Ill. 2d 18.) Thus, such directive as we have from the legislature can be regarded as contrary to the conclusion the majority reaches.

The legislative comments on which the majority appears to place sole reliance for its holding are, in my judgment, neither helpful nor appropriate in reaching the proper result in this case. Rather, applying the statutory provisions in accordance with their clear and plain meaning leads to a resolution of this appeal in favor of the taxpayer without the need to consider either the inconclusive comments of three members of the general assembly or the constitutional arguments the taxpayer has advanced.

Filed Apr. 19, 1985
Clerk Supreme Court
Illinois

APPENDIX B

Fifth Division
November 10, 1983

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

CHICAGO TRIBUNE COMPANY,
Plaintiff-Appellant,

and

ROCKWELL GRAPHIC SYSTEMS, INC.; ROCKWELL INTERNATIONAL CORPORATION; ACCO INDUSTRIES, INC.; ARROW ELECTRONICS, INC.; RYCO GRAPHIC MANUFACTURING, INC.; SIGNODE CORPORATION; AND CENTRAL DATA CORPORATION,
Intervenor Plaintiffs-Appellants,
vs.

J. THOMAS JOHNSON, individually and as Director, Illinois Department of Revenue; and JERRY COSENTINO, individually and as State Treasurer of Illinois; and THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County

Honorable Joseph M. Wosik,
Presiding.

JUSTICE MEJDA delivered the opinion of the court:

Defendants, the Illinois Department of Revenue, the State Treasurer, and the Director of the Department of Revenue, appeal from the judgment of the circuit court which held that plaintiff, Chicago Tribune Company, met the statutory requirements for an exemption from the Use Tax Act (Ill. Rev. Stat. 1981, ch. 120, par. 439 *et seq.*), and that the monies which plaintiff had paid into a protest fund must be invested and the interest earned thereon paid to the prevailing party. Defendants seek reversal of both rulings. For the reasons which follow we reverse the judgment of the circuit court.

At issue is the proper construction of the Use Tax Act which provides, in part, that a "tax is imposed upon the privilege of using in this State tangible personal property . . . ." (Ill. Rev. Stat. 1981, ch. 120, par. 439.3.) Plaintiff has recently purchased several new printing presses and other machines for use in the printing of the *Chicago Tribune*. Neither party has questioned whether these machines are within the scope of the proviso imposing the use tax. Plaintiff asserts, and the circuit court held, that the machinery is not subject to use tax because it qualifies for the following statutory exemption:

> The tax imposed by this Act does not apply to the use of machinery and equipment primarily in the process of the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease . . . . (Ill. Rev. Stat. 1981, ch. 120, par. 439.3.)

Defendants conceded at oral argument that plaintiff's machinery is used in "manufacturing or assembly," but they contend that the newspapers which result from that manufacturing process are not "tangible personal property" for sale or lease within the meaning of the exemption.

The circuit court's memorandum opinion contained an extensive factual discussion; the nature of our decision, however, obviates the need for a lengthy factual discourse in this

opinion. It is sufficient to note that two witnesses testified to the various procedures which comprise the printing of the *Chicago Tribune*. The trial court found, as a matter of fact, that the publication of a newspaper results in "tangible personal property." Although the Use Tax Act does not define "tangible personal property," the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1981, ch. 120, par. 440 *et seq.*) provides explicitly that "[t]he purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of tangible personal property." (Ill. Rev. Stat. 1981, ch. 120, par. 440.) The defendants urge that, as a matter of law, a newspaper is not "tangible personal property" for sale by virtue of the definition in the Retailers' Occupation Tax Act.

Before discussing the merits of this argument, we must consider the plaintiff's contention that the defendant Department of Revenue admitted in the trial court that individual *Chicago Tribunes* are tangible personal property. This assertion is based on a letter from the Chief of the Revenue Litigation Division of the Attorney General's office. This letter stated in relevant part that "this office is prepared at this time to stipulate only to paragraphs 1 through 4 and 43 through 50 of your proposed draft [stipulation]." Paragraph 50 of the proposed stipulation provided that "[e]ach item of machinery and equipment purchased by Tribune . . . is used primarily in the production of *Chicago Tribunes*, which are tangible personal property." In our view, the "prepared to stipulate" language of the letter in question does not constitute a sufficiently definite agreement to stipulate to the proposed facts. (See *City of Rolling Meadows* v. *Kohlberg* (1980), 83 Ill. App. 3d 10, 16, 403 N.E.2d 1040; see also 34 Ill. L. & Prac. *Stipulations* §2 (1958).) Accordingly, we conclude that no valid stipulation was entered into at the trial level. We will therefore consider the defendants' argument.

The defendants assert that the phrase "tangible personal property" is a term of art which has the same meaning wher-

ever it is used. The plaintiff responds that the Use Tax Act and the Retailers' Occupation Tax Act are two completely different statutes with entirely different purposes, and therefore a definition in one may not validly be applied to the construction of the other. The interrelationship between the Use Tax Act and the Retailers' Occupation Tax Act cannot be so easily dismissed, however. Our supreme court has held that the basic purposes of the Use Tax Act "are to complement the Retailers' Occupation Tax Act by preventing the evasion of tax on purchases made outside the State and to equalize the competitive disadvantage of Illinois retailers who face retailers' occupation tax liability. (*Illinois Road Equipment Co.* v. *Department of Revenue* (1965), 32 Ill. 2d 576, 580.)" (*United Air Lines, Inc.* v. *Johnson* (1981), 84 Ill. 2d 446, 450, 419 N.E.2d 899; see also *American Airlines, Inc.* v. *Department of Revenue* (1974), 58 Ill. 2d 251, 252, 319 N.E.2d 28; *Howard Worthington, Inc.* v. *Department of Revenue* (1981), 96 Ill. App. 3d 1132, 421 N.E.2d 1030.) Plaintiff's argument focuses exclusively on the latter purpose, while disclaiming the legitimacy of the former. The supreme court has indicated, however, that the Use Tax Act and the Retailers' Occupation Tax Act together comprise a comprehensive legislative system for the taxation of the sale, purchase, and use of tangible personal property.

> The Use Tax Act complements the Retailers' Occupation Tax Act in such a fashion so that an Illinois retailer who collects the use tax as an agent of the State is correspondingly relieved of his retailers' occupation tax liability on the transaction [citation.] On the other hand, purchasers who seek to avoid having the retailers' occupation tax liability passed on to them by buying goods outside the State face use tax liability on goods they bring into Illinois. (*United Airlines, Inc.* v. *Johnson* (1981), 84 Ill. 2d 446, 450-51, 419 N.E.2d 899.)

While this interrelationship is not of itself determinative of the question before us, it does provide a basis for rejecting the

plaintiff's argument that the two statutes are independent of one another.

> 'Statutes which relate to the same thing or to the same subject or object are *in pari materia* although they were enacted at different times. It is a primary rule of statutory construction that not only should the intention of the legislature be deduced from a view of the whole statute and from its every material part, but statutes *in pari materia* should be construed together. *People ex rel. Harrell* v. *Baltimore and Ohio Railroad Co.* 411 Ill. 55, 58 and 59." (*People ex rel. Nordstrom* v. *Chicago & North Western Ry. Co.* (1957), 11 Ill. 2d 99, 106, 142 N.E.2d 26.)

Because the Use Tax Act was enacted as a complement to the Retailers' Occupation Tax Act and because both statutes implement the legislature's plan for the taxation of transfers of tangible personal property, we conclude that the two statutes are *in pari materia*. Construing the two statutes together, we conclude that the legislative exclusion of newspapers from the definition of tangible personal property in the Retailers' Occupation Tax Act may be applied to define that same term in the Use Tax Act. (See *People ex rel. Scott* v. *Schwulst Building Center, Inc.* (1982), 89 Ill. 2d 372, 432 N.E.2d 855.) Under the definition adopted by the legislature, plaintiff as a matter of law does not produce items of tangible personal property. Accordingly, plaintiff does not qualify for the exemption from the use tax.

We note that plaintiff's presentation in the trial court was designed to prove that individual copies of the *Chicago Tribune* were tangible items of personal property within the dictionary definition of those terms. But the legislature is not bound to follow commonly-recognized meanings of terms or existing definitions created by persons in other fields. (*People* v. *McCarty* (1981), 86 Ill. 2d 247, 254, 427 N.E.2d 147.) When the legislature has defined a term, it is our duty to apply that definition and not some other which might appear to be more plausible.

Plaintiff contends that our construction of the statute is inappropriate in light of the legislative purpose of the exemption. Plaintiff relies on *Time Inc.* v. *Hulman* (1964), 31 Ill. 2d 344, 201 N.E.2d 374, in which our supreme court articulated the rationale of the newsprint exemption from the retailers' occupation tax as "to prevent discrimination against newspapers in favor of radio and television, which furnish news and other information, but do not transfer tangible personal property." (31 Ill. 2d 344, 351, 201 N.E.2d 374.) Plaintiff asserts that this same rationale applies to the use tax and that the exemption from that tax should be construed to apply to the newspaper business. Plaintiff's argument overlooks an important distinction between the use tax and the retailers' occupation tax, however. The latter tax is imposed on the transfer of tangible personal property; because the electronic media do not present information in a tangible form and the print media do so, the tax imposed on the transfer of tangible personal property would discriminate against the print media in the absence of an exemption. Interestingly, the exemption from the retailers' occupation tax does not provide that newspapers are exempt from the tax, but only provides that newspapers receive the same treatment as the electronic media: "The purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news . . . is not a purchase, use or sale of tangible personal property." (Ill. Rev. Stat. 1981, ch. 120, par. 440.) In contrast to the retailers' occupation tax, the use tax is imposed on the use of tangible personal property. This distinction achieves significance in the context of the news media because, while the electronic media do not transfer information in a tangible form and the print media do, both forms of media utilize machinery to transmit that information. It is this machinery which is the subject of the use tax and, within the ambit of that tax, the differences in which the various media communicate information do not result in differential tax treatment. Accordingly, the rationale of *Time Inc.* v. *Hulman* is inapplicable to the instant case and does

not, therefore, mandate the application of the exemption from use tax to plaintiff.

Plaintiff also contends that the principal objective of the legislature in enacting the use tax exemption for manufacture of tangible personal property was to encourage the expansion of industry within the state and to discourage the exodus of businesses from the state by exempting the purchase of manufacturing machinery from the use tax. Plaintiff argues that in order to implement that legislative purpose the exemption from the use tax should be construed to apply to sales of printing machinery and equipment to newspapers. The defendants point out that other industries which meet the letter of the exemption are subject to the Retailers' Occupation Tax Act, unlike plaintiff. Plaintiff responds that a more specific exemption in the Use Tax Act could have provided for an exemption for property which, when sold at retail, generates retailers' occupation tax liability. But our holding is not based on the defendants' formulation of the legislative rationale that an article must be subject to the retailers' occupation tax in order to qualify for the exemption from the use tax. Rather, we rely on the plain language of the definition excluding transactions of newsprint from the scope of the phrase "tangible personal property." (Ill. Rev. Stat. 1981, ch. 120, par. 440.) While plaintiff's argument derives some support from the apparent policy concerns of the statute, "a statute which exempts property from taxation should be strictly construed in favor of taxation and . . . a party claiming an exemption has the burden to prove clearly and conclusively that he is entitled to the exemption. [Citation.] In determining whether an exemption is applicable, every presumption is against the intention of the State to exempt property from taxation." (*Telco Leasing, Inc.* v. *Allphin* (1976), 63 Ill. 2d 305, 310, 347 N.E.2d 729; see also *United Air Lines, Inc.* v. *Johnson* (1981), 84 Ill. 2d 446, 455-56, 419 N.E.2d 899.) Plaintiff's argument does not persuade us that the legislature intended to exempt its machinery from the imposition of the use tax.

Plaintiff next contends that our construction of the statute violates its rights under the First Amendment to the United States Constitution. Defendants respond that this proposition was not argued to the trial court and is therefore waived. (See *Kravis* v. *Smith Marine, Inc.* (1975), 60 Ill. 2d 141, 147, 324 N.E.2d 417.) "Nonetheless, the appellee may advance any argument supported by the record to sustain the judgment of the trial court [citation], and the reviewing court may affirm the trial court when justified in law for any reason [citation]." (*Ozment* v. *Lance* (1982), 107 Ill. App. 3d 348, 350, 437 N.E.2d 930.) Plaintiff's argument contemplates a legal determination not rebuttable merely by the introduction of evidence at trial. Our consideration of that argument in the absence of its presentation to the trial court (and the concomitant opportunity to introduce proof in opposition thereto) will not, therefore, prejudice defendants. (See *Sheldon* v. *Colonial Carbon Co.* (1983), 116 Ill. App. 3d 797, 803, N.E.2d .) We will accordingly consider plaintiff's argument on its merits.

Plaintiff relies on the recent decision of the United States Supreme Court in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue* (1983), U.S. , 103 S. Ct. 1365. That case is inapposite to the instant case, however, because Minnesota "has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment." (103 S. Ct. 1365, 1370.) The statute at issue in the case *sub judice* is a general statute which applies to all enterprises. While the legislature has exempted some areas of commerce from the provisions of the tax, the exemptions are not so pervasive that we could characterize them as rendering the proviso for taxation "facially discriminatory." (See 103 S. Ct. 1365, 1370.) Accordingly, we conclude that our construction of the Use Tax Act does not infringe plaintiff's rights under the First Amendment.

In summary, the exemption for manufacturing of tangible personal property does not apply to plaintiff because, as a

matter of law, its operations do not produce tangible personal property. This holding does not conflict with the proscriptions of the First Amendment. Because our holding provides an adequate basis for reversing the judgment of the trial court, we need not consider the defendants' argument concerning investment of the monies in the protest fund. For the foregoing reasons, the judgment of the circuit court is reversed.

Reversed.

WILSON, P.J., and
LORENZ, J., concur.

APPENDIX C

IN THE

Circuit Court of Cook County, Illinois County Department,

CHANCERY DIVISION

CHICAGO TRIBUNE COMPANY, an Illinois corporation,

Plaintiff,

and

ACCO INDUSTRIES, INC., a New York corporation; ARROW ELECTRONICS, INC., a New York corporation; CENTRAL DATA CORPORATION, a Delaware corporation; ROCKWELL GRAPHIC SYSTEMS, INC., a Delaware corporation; ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation; RYCO GRAPHIC MANUFACTURING, INC., an Illinois corporation; and SIGNODE CORPORATION, a Delaware corporation;

Intervention Plaintiffs,

vs. **No. 80 CH 3407**

J. THOMAS JOHNSON, *et al.*,

Defendants.

DECLARATORY JUDGMENT AND DECREE

THIS CAUSE coming on for trial upon the joint petition of the Plaintiff, Chicago Tribune Company, and the Intervention Plaintiffs, Acco Industries, Inc., *et al.*; and the Court having heard the testimony of witnesses; having examined the documents received in evidence; having read and considered the memoranda submitted by the parties; having heard

the arguments of counsel for the parties; and having researched the applicable law; after due consideration of all of the foregoing and being fully advised in the premises makes and enters the following findings of fact, conclusions of law, and final declaratory judgment and decree.

INTRODUCTION

1. Plaintiff Chicago Tribune Company (the "Chicago Tribune") publishes the *Chicago Tribune*, a daily newspaper of general circulation distributed and sold to the public at large throughout the State of Illinois. The Chicago Tribune prints the newspaper and has constructed a new printing plant approximately 700,000 sq. ft. in area in downtown Chicago, between Grand Avenue on the south, the Chicago River on the east, Chicago Avenue on the north, and Halsted Street on the west, for that purpose. The new plant includes: (a) a holding facility for newsprint; (b) a "roll laydown area" where rolls of newsprint are prepared for use and held for production; (c) ten new printing presses; and (d) a "mailroom" where newspapers are stuffed with pre-printed materials, counted, bundled, and labeled for distribution.

2. In connection with construction of the new plant, the Chicago Tribune has made substantial purchases of machinery and equipment such as printing presses. The Chicago Tribune has paid a certain portion of the Illinois Use Tax assessed on such purchases under protest. The Chicago Tribune filed this action to recover those taxes paid under protest.

3. Certain of the vendors of the machinery and equipment to the Chicago Tribune have paid Illinois Municipal or Regional Transportation Authority ("RTA") Retailers' Occupation Taxes under protest and have joined in this action as Intervention Plaintiffs. They are:

> Acco Industries, Inc., a New York corporation, located at Salem, Illinois;
>
> Arrow Electronics, Inc., a New York corporation, located at Schaumburg, Illinois;

Central Data Corporation, a Delaware corporation, located at Champaign, Illinois;

Rockwell Graphic Systems, Inc., a Delaware corporation, located at Cicero, Illinois;

Rockwell International Corporation, a Delaware corporation, located at Pittsburgh, Pennsylvania;

Ryco Graphic Manufacturing, Inc., an Illinois corporation, located at Wheeling, Illinois;

Signode Corporation, a Delaware corporation, located at Glenview, Illinois.

4. The State of Illinois imposes Use Tax upon "the privilege of using in this State tangible personal property purchased at retail from a retailer at the rate of 4% of the selling price of such property." (*Ill. Rev. Stat.* ch. 120, § 439.3.) The State also imposes Retailers' Occupation Tax upon persons engaged in selling such property at retail. (*Ill. Rev. Stat.* ch. 120, § 441.)

5. The RTA and various local municipalities also impose Retailers' Occupation Taxes upon such sales which take place within their respective jurisdictions. (*Ill. Rev. Stat.* ch. 24, § 811-1, and ch. 111 2/3, § 7.04.03(e).)

6. The Chicago Tribune will use the presses and other machinery and equipment within Illinois and Plaintiffs admit that the purchases of the presses and other items were at retail.

7. The Use Tax statute, however, goes on to provide, in pertinent part:

> The tax imposed by this Act does not apply to the use of machinery and equipment primarily in the process of the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease, whether such sale or lease is made directly by the manufacturer or by

> some other person. This exemption includes machinery and equipment which replaces machinery and equipment in an existing manufacturing facility as well as machinery and equipment which is for use in an expanded or new manufacturing facility. For the purposes of this exemption, each of these terms shall have the following meanings: (1) *"manufacturing process" shall mean the production of any article of tangible personal property, . . . by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. (2) "assembling process" shall mean the production of any article of tangible personal property, by the combination of existing materials in a manner commonly regarded as assembling which results in a material of a different form, use or name.* Provided that this shall apply to the proceeds of such sales qualifying under this Section according to the following schedule: (1) 31.25% of the proceeds of such sales made from January 1, 1979, through December 31, 1979; (2) 31.25% of the proceeds of such sales made from January 1, 1980 through December 31, 1980; (3) 56.25% of the proceeds of such sales made from January 1, 1981, through December 31, 1981.

(*Ill. Rev.* Stat. ch. 120, § 439.3 (emphasis supplied).)

8. Section 441 of the Retailers' Occupation Tax Act contains a comparable provision, which is also incorporated by reference into the RTA and various applicable Municipal Retailers' Occupation Taxes involved here. The State of Illi-

nois and the local entities involved thereby partially exempt from sales taxes purchases of manufacturing machinery and equipment. (Hereinafter, the machinery and equipment exemption is referred to as the "Manufacturing Exemption.")

9. Defendants Department of Revenue and J. Thomas Johnson are charged by statute with the administration and collection of the Use Tax and the various local Retailers' Occupation Taxes at issue here. (*Ill. Rev. Stat.* ch. 127, § 39b19, 39b28, and 39b33.)

10. Defendant Department of Revenue has published, in Article No. 2, Paragraph 9, of its Retailers' Occupation Tax Articles, the following rule:

> The printing process is not commonly regarded as manufacturing and court decisions have found that printing is not manufacturing. Therefore, machinery and equipment used in any printing application will not qualify for exemption. This includes graphic arts, newspapers, books, etc. as well as other industrial or commercial applications.

(*Ill. Reg.*, Vol. 4, Issue 24, June 13, 1980, pp. 540-41.)

11. The Illinois Use Tax complements the Retailers' Occupation Tax and Rule No. 11 of the Department's Use Tax Rules incorporates the Retailers' Occupation Tax Rules and Regulations by reference. Article 2, Paragraph 9, *supra*, therefore applies equally to the Use Tax.

12. Defendants Johnson and Department of Revenue have assessed and demanded Use and Retailers' Occupation Taxes from the Chicago Tribune and Intervention Plaintiffs on the purchases of the presses and other machinery and equipment. Plaintiffs have paid part of these taxes under protest pursuant to *Ill. Rev. Stat.* ch. 127, §§ 172 and 172a. The amounts of tax paid under protest were calculated by applying the Manufacturing Exemption rate for the applica-

ble year to the tax on the payments made for presses or other purchases. Under the requirements of the payment under protest statute (ch. 127, § 172), money paid under protest must be placed in a special fund identified as the "Protest Fund." This Court previously enjoined the release of the Protest Fund pending resolution of this matter and ordered that the Protest Fund be invested with the interest earned thereby to be credited to the Protest Fund.

13. Plaintiffs here presented evidence that the printing of the *Chicago Tribune* involves changes in the form, use and name of existing materials; that these changes are effected by processing huge rolls of newsprint, impressing words and images on them with ink by means of complex and sophisticated presses and other related machinery and equipment and then cutting, folding, assembling and bundling the resultant newspaper product for sale and distribution; and that these activities result in a product which is tangible, which is personal property and which is sold. Defendants claim that the Chicago Tribune sells intangible information rather than tangible personal property.

14. Judgment is hereby entered for the Plaintiffs based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. The Chicago Tribune's Production Process

15. The news gathering and editorial functions of the Chicago Tribune are located in the Tribune Tower, 435 North Michigan Avenue, Chicago, Illinois. Located a little over a mile away from the Tribune Tower, the Chicago Tribune's new printing plant is kept in communication with the editorial staff by means of a microwave telecommunication system. (Pl. Ex. 1 and 38; Tr. 5-13, 103.*/)*/

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*/ Plaintiff's and Intervention Plaintiffs' trial exhibits are cited herein as "Pl. Ex." followed by the exhibit number(s). The trial transcript in this matter is cited herein as "Tr." followed by the pertinent page number(s).

16. News, advertising, photographs and the other elements of the newspaper are written, assembled and edited at the Tribune Tower and then "dummies" of the pages to be printed are made, read by one of three "laser readers," and transmitted by microwave to the new plant. (Pl. Ex. 1; Tr. 5-13.)

17. The microwaves are received and reconverted by six "laser writers" at the new plant which make "plates" of the pages on aluminum sheets, each of which is approximately 12/1000 of an inch thick and the length and width of a page of the paper. (Pl. Ex. 1; Tr. 5-13.)

18. Each plate is grained, so that it will hold a thin film of moisture. The image on the plate is reproduced by wetting and inking the plate with just the right amounts of chemically treated water and ink. The image is then transferred from the inked plate to a sheet of newsprint by impression. Specifically, the plate is wrapped around a cylinder, so that the image may be reproduced at high speed by rolling the inked cylinder against a "blanket," a smooth rubber sheet wrapped around another cylinder which is then rolled against the newsprint sheet or "web" as it passes through the press. (Pl. Ex. 1; Tr. 5-13.)

19. Individually wrapped newsprint rolls, each weighing a approximately a ton, are manufactured elsewhere and come to the Chicago Tribune's new plant by railroad. When the rolls are needed, they are sent by conveyor to one of the four "stripping stations" in the "reel room". At each station, each arriving roll is flipped onto its side, raised and rotated slowly, and "stripped" of bands, wrappers, and any damaged newsprint on the roll. The useful portions of rolls which are too badly damaged for efficient use in production are saved and combined, by means of a device called a "paper roll rewinder," so as to make efficiently usable rolls from them. Finally, each roll is adjusted to make sure that the unwind rotation is correct. (Pl. Ex. 1, 3, 39, 40, 43 and 45; Tr. 5-13, 34-35, 105-109.)

20. After stripping, each roll is moved by another conveyor to one of the three "laydown ramps" which are temporary storage areas where rolls are held before being used in production. (Pl. Ex. 1, 3 and 40; Tr. 5-13, 34-35, 106.)

21. From the laydown ramps, rolls are individually loaded onto dollies for delivery to the presses. Each loaded dolly is towed to a "reel stand". There the newsprint roll is transferred to "reel arms" which hold the roll and feed it into the press during production. (Pl. Ex. 1, 44 and 45; Tr. 5-13, 108-109.)

22. Separately, the ink used in production is delivered to the plant by truck and stored in one of eight new ink tanks. Ink is moved from the tanks to the presses by pumps, through a distribution system suspended from the reel room ceiling consisting chiefly of pipes and valves. (Pl. Ex. 1; Tr. 5-13, 20-21.)

23. The new plant contains ten new "Goss Metroliner" offset printing presses. Each of the presses is capable of producing fully assembled 144-page newspapers. Each press contains nine printing "units," the roll-handling equipment necessary to feed a continuous web of paper to each unit, and a "folder" capable of handling the webs and converting them into newspapers. (Pl. Ex. 1, 5, 44, 45, 46, 47 and 48; Tr. 5-13, 21, 35-36, 108-110.)

24. Each unit is accompanied by its own reel tension paster ("rtp") which is located in the reel room below the "pressroom" so that the rolls of newprint may be brought to the presses and fed into production without interfering with the printing process. (Pl. Ex. 1, 44 and 45; Tr. 5-13, 108-109.)

25. Each rtp is able to hold three rolls of newsprint at one time, one of which is unrolled as it is fed into the unit above. Each full roll of newsprint is 58" in width, 45" in diameter, and weighs approximately 2000 pounds. The rtp's, however, can handle the smaller 3/4 size rolls (of about 44" in width), and 1/2 size rolls (of about 29" in width) which are occasionally used. Each rtp holds the rolls, feeds a web into

the press, and attaches the end of one roll as it is used up to the beginning of the next. By means of the rtp's, a continuous web can be maintained during a production run and it is not necessary to stop the presses in order to change rolls of newsprint. (Pl. Ex. 1, 44 and 45; Tr. 5-13, 108-109.)

26. Each unit contains two "printing couples". The two couples, working together, print both sides of eight full newspaper pages per revolution of the cylinders. Thus, during production, each unit is able to print sixteen pages of the newspaper onto the web passing through that unit. Two of the nine units in each press have the capacity to print color, which requires an additional printing couple in each such unit but does not increase the unit's page capacity. (Pl. Ex. 1, 5, 46, 47 and 48; Tr. 5-13, 35-36, 109-110.)

27. Each unit reproduces the same sixteen pages over and over on the web going through the unit. If all the units in a press are running, nine continuous streams of newsprint are printed simultaneously. When full size rolls are being processed, the webs are each four times as wide as a single page of the paper and twice as wide as any of the pieces of the newspaper made from them. (Each such "piece" is a double page, folded in the center when the paper is finished.) The web is also thousands of times longer than any single newspaper page. (Pl. Ex. 1; Tr. 5-13.)

28. The folder takes these nine "endless" sheets of printed paper and cuts them, stacks them, folds them, and cuts them again, thereby producing individual copies of the *Chicago Tribune*. (Pl. Ex. 1, 5, 46, 47 and 48; Tr. 5-13, 34-35, 109-110.)

29. The folder can also be adjusted for both "collect" and "straight" production runs. A "straight run" of a unit prints two copies of each of eight different pages of the newspaper with every revolution of the cylinders. (Pl. Ex 1; Tr. 5-13.)

30. "Running collect" produces sixteen different pages of the newspaper, one copy of each, with each revolution. (Pl. Ex. 1; Tr. 5-13.)

31. Because of the difference between straight and collect running, the folder must be capable of accommodating either method. The flexibility of being able to choose to run straight or collect has a direct bearing on the number of press lines in operation. For example, if a particular edition of the *Chicago Tribune* will be 72 pages or less in size, the entire paper may be produced by straight runs on the presses. On the other hand, if the edition exceeds 72 pages, it will be necessary to use collect runs to produce the entire paper. A straight run of a press will produce twice as many copies of the paper in a given time. Since time is often of the essence in newspaper publishing, the ability to save time by running straight is essential, but the capacity to run collect is also important because of the costs involved in "firing up" extra presses. (Pl. Ex. 1; Tr. 5-13.)

32. Five of the ten presses can also run "double delivery." This option permits the production of two distinct products on one press during a single production run. For example, two different sections of the Sunday edition of the *Chicago Tribune* can, at the same time, be printed and delivered to the mailroom by one press. The "double delivery" feature means that the two are not intermixed. Otherwise, it would be impractical to print two products at once on one press. (Pl. Ex. 1; Tr. 5-13.)

33. When the presses are running in full production, thousands of individual copies of the *Chicago Tribune* per hour are created. This volume of papers has to be stuffed, stacked, bundled and labeled before there is a finished product for distribution. (Pl. Ex. 1; Tr. 5-13.)

34. Newly printed copies of the *Chicago Tribune* are sent by conveyors from each of the presses to the "mailroom" on the top floor of the new plant. There, they are stuffed with any outside prints to be inserted (such as advertising

supplements, which the advertiser may have printed elsewhere and shipped to the Chicago Tribune's plant), counted, bundled, labeled, allocated to a route and sent to the loading docks for distribution. (Pl. Ex. 1, 4, 41, 42 and 49; Tr. 5-13, 34, 106-110.)

35. Bundles of newspapers are then underwrapped and tied, and labeled for distribution when this is necessary. Papers going to the north suburbs, for example, may contain different local advertising inserts than those going to the south suburbs. It is therefore sometimes necessary to identify each bundle for distribution to a particular route. Additionally, some newspapers are distributed by means of the U.S. Postal Service and have to be labeled and bundled in accordance with the Post Office's particular requirements. (Pl. Ex. 1; Tr. 5-13.)

36. The mailroom also includes various computer components comprising the "mailroom manifest system". The mailroom manifest system performs several functions, all involving the labeling and handling of newspapers and newspaper bundles. It coordinates and directs the printing of the truckload manifests, wrappers, and labels, which are necessary to preparation of the finished product: newspapers ready for distribution. (Pl. Ex 1, 6 and 7; Tr. 5-13, 23, 37-40.)

37. When the newspapers have been bundled, wrapped, tied, and labeled, they are ready for distribution. A tray conveyor system takes them from the mailroom down to the circulation dock, which is on the lowest level of the plant. There, the newspapers are loaded onto trucks according to route and leave the plant. (Pl. Ex. 1, 4 and 49; Tr. 5-13, 35, 110.)

B. Machinery and Equipment Purchased by the Chicago Tribune

38. The Chicago Tribune has purchased ten new Goss Metroliner offset printing presses for use in the new plant. In addition to the presses, the Chicago Tribune has purchased other machinery and equipment for use in the production of

the newspaper. Specifically, the Chicago Tribune has made the purchases from the suppliers and has paid the purchase prices and the applicable portions of the 4% Illinois Use Tax on such purchases under protest, all as described in Plaintiff's Exhibits 2, 9 and 50. (Tr. 22-34, 112-122.)

39. The dates of the Chicago Tribune's payments and the amounts paid on those dates are as set forth in Plaintiff's Exhibits 9 and 50. (Tr. 22-34, 112-122.) Through July 15, 1982, the Chicago Tribune has paid a total of $1,592,305.83 under protest pursuant to this action. An additional amount of approximately $57,000 will be at issue as the Chicago Tribune makes final payments on certain of the purchases.

40. Some of the machinery and equipment bought by the Chicago Tribune for use in the new plant was purchased from Intervention Plaintiffs, who are vendors subject to liability for Illinois Municipal or RTA Retailers' Occupation Taxes upon such sales. (Pl. Ex. 50; Tr. 112-122.)

41. The Illinois Municipal and RTA Retailers' Occupation Tax Acts incorporate the Manufacturing Exemption contained in the Illinois Use and Retailers' Occupation Tax Acts by reference. *Ill. Rev. Stat.* ch. 24, § 8-11-1, and ch. 111 2/3, § 704.03(e). The liability of each of the Intervention Plaintiffs for such taxes, therefore, involves questions of fact and law which are identical with these governing the Chicago Tribune's liability for the Use Tax. Accordingly, they have paid portions of the Municipal and RTA Retailers' Occupation Taxes (as applicable) on such sales under protest and have joined in this action as Intervention Plaintiffs. (Pl. Ex. 8, 10 and 50; Tr. 112-122.)

42. The names and addresses of the Intervention Plaintiffs, the purchase prices received from such sales and the Municipal and RTA taxes thereon and the portions thereof paid under protest for all such sales to the Chicago Tribune

are set forth in Plaintiff's Exhibit 8. The dates of such payments and the amounts paid on each such date by each Intervention Plaintiff are as described in Plaintiff's Exhibit 10. (Tr. 112-122.)

43. Each purchase of machinery and equipment by the Chicago Tribune in question here was of machinery and equipment for use in the production of the *Chicago Tribune* which is tangible personal property for sale. (Pl. Ex. 6 and 7; Tr. 34, 37-40.)

C. Printing Is "Manufacturing" Under The Federal Standard Industrial Classification Manual

44. The Executive Branch of the United States Government publishes the Standard Industrial Classification Manual. As described in its Preface, the Manual "has been developed to promote the comparability of statistics describing various facets of the economy . . . [and] defines industries in accordance with the composition and structure of the economy."

45. The *Manual* establishes twelve major "Divisions" of industrial activities. Overall classification was guided by these general rules (set out on page 9 thereof):

(1) Conformity to the "existing structure of American industry."

(2) Each establishment was classified "according to its primary activity."

(3) To be recognized as an industry, the group of establishments constituting a proposed classification had to be "statistically significant in the number of persons employed, the volume of business done, and other measures of economic activity."

46. "Manufacturing" comprises the whole of Division D and encompasses some twenty "Major Groups," each containing subgroups. The *Manual*, on page 57, specifies the

characteristics used to determine if an activity should be classified as manufacturing:

> The manufacturing division includes establishments *engaged in the mechanical or chemical transformation of materials or substances into new products.* These establishments are usually described as plants, factories or mills and characteristically use power driven machines and materials handling equipment. Establishments *engaged in assembling component parts of manufactured products* are also considered manufacturing if the new product is neither a structure nor other fixed improvement. Also included is the blending of materials such as lubricating oils, plastics, resins, or liquors. [Emphasis supplied.]

47. This description is similar to the definition of "manufacturing" in the Illinois Manufacturing Exemption in that it requires a change in the materials involved by an activity such as assembling, blending, or mechanical or chemical alteration, which are analogous to refining, processing, and fabricating.

48. "Printing, Publishing and Allied Industries" are all designated as manufacturing activities in Major Group 27, discussed at page 106 of the *Manual*. Newspapers are specifically included in Group No. 271, Industry 2711, a subgroup of Major Group 27. (*Id.*)

49. Thus, for the purposes of compiling and analyzing data on the economy of the country, the Executive Branch of the Federal Government regards printing a newspaper as manufacturing.

D. Newspapers Are Classified As A Manufacturing Activity By The Department Of Revenue Of The State Of Illinois For Purposes Of Registration To Collect The Retailers' Occupation Tax

50. Perhaps the most convincing evidence that modern newspaper production is manufacturing is that Defendant Department of Revenue has already classified newspapers as manufacturing businesses. (Pl. Ex. 36 and 50; Tr. 112-122.)

51. Illinois retailers are required by statute to register to collect the Retailers' Occupation Tax on their taxable sales. (*Ill. Rev. Stat.* ch. 120, 441a.) The Department has prescribed Form NUC-1, "Illinois Business Taxpaper Application For Registration" for this purpose. Question 15 on Form NUC-1 requires the applicant to "classify" his business and list the code given to that type of business by the Department on Form RR524, "Business Classification Codes," which accompanies the Application. (Pl. Ex. 36 and 50; Tr. 112-122.)

52. Businesses are divided by Form RR524 into eight major fields of activity:

Agriculture, Forestry, and Fishery
Construction
Retail Trade
Miscellaneous
Services
Transportation
Wholesale Trade
Manufacturing

"Newspapers" (assigned code 2711) are classified under "MANUFACTURING." Thus, the Department itself has publicly characterized newspapers as manufacturers. (Pl. Ex. 36 and 50; Tr. 112-122.)

E. Printing is "Manufacturing" Within The Dictionary Definition

53. The common meanings of the terms "assembling," "manufacturing," "processing," and "fabricating," as found in the dictionary, certainly include within one or more of such terms the newspaper printing process, wherein blank newsprint in huge rolls is impressed with ink by sophisticated presses and is cut, assembled, folded, and bound for distribution.

54. Webster's defines "assemble," "assembling" and "assembly," in pertinent part, as follows:

> 1 assemble . . . *1*: to bring or summon together into a group, crowd, company, assembly, or unit . . . *2*: to bring together: as a: to put or join together used in an orderly way with logical selection or sequence . . . *b*: to fit together various parts of so as to make into an operative whole . . . syn see GATHER . . . .
>
> assembling . . . the act or action of those that assemble: as . . . *b*: the concentrating of goods or the achieving of control of goods to facilitate sale or purchases . . . .
>
> assembly . . . *5a*: the act or process of building up a complete unit (as a motor vehicle) using parts already in themselves finished manufactured products . . . *b*: a collection of parts so assembled as to form a complete machine . . . .

(Webster's Third New International Dictionary of the English Language, 131 (unabr. 1961).)

55. *Webster's* defines "manufacture," "manufacturer" and "manufacturing" as follows:

> 1 manufacture . . . *1*: something made from raw materials by hand or by machin-

> ery . . . *2a*: the process or operation of making wares or other material products by hand or by machinery esp. when carried on systematically with division of labor . . . *b*: a productive industry using mechanical power and machinery. . . .
>
> 2 manufacture . . . *1*: to make (as raw material) into a product suitable for use . . . *2a*: to make from raw materials by hand or by machinery . . . *b*: to produce according to an organized plan and with division of labor . . . *4a*: to produce as if by manufacturing: CREATE. . . .
>
> manufacturer . . . one that manufactures: as . . . *b*: an employer of workers in manufacturing: the owner or operator of a factory . . . *c*: one who changes the form of a commodity or who creates a new commodity.

(*Id.* at 1378.)

56. *Webster's* defines "process" as follows, in pertinent part:

> 2 process . . . *2*: to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result: put through a special process: as a *(1)*: to prepare for market, manufacture, or other commercial use by subjecting to some process . . . *(2)*: to make usable by special treatment. . . .

(*Id.* at 1808.)

57. "Fabricate" and "fabrication" are defined, in pertinent part, as:

> fabricate . . . *1a*: to form by art and labor: MANUFACTURE, PRODUCE [an organi-

> zation devoted to fabricating deluxe editions of the classics] *b*: to form into a whole by uniting parts: CONSTRUCT, BUILD . . . often: to build up into a whole by uniting interchangeable standardized parts . . . *2a*: to make, shape, or prepare (parts) according to standardized specification so as to be interchangeable . . . *b*: to cause (raw material or stock) to be manufactured: SHAPE. . . .
>
> fabrication 1: the act or process of fabricating: as *a*: the assembly of materials into a structure . . . *c*: the process of converting one form of metal into another (as ingots into rolled shapes, rolled shapes into structural members, castings into weldments, wire into springs, forgings into gears). . . .

(*Id.* at 811.)

58. Thus, the plain language of the Manufacturing Exemption includes newspaper printing because the ordinary meanings and common usage of the terms "manufacturing," "processing," "fabricating," and "assembling", as reflected in dictionary definitions, certainly encompass the modern newspaper printing process.

CONCLUSIONS OF LAW

59. The plain language of the Manufacturing Exemption requires that three different criteria must be met if a purchase of machinery and equipment is to be exempt from the Retailers' Occupation and Use Taxes:

> 1. The user's product must be tangible personal property which is sold or leased;

2. There must be a changing in the form, use or name of existing materials; and

3. The change must result from an activity which is commonly regarded as assembling, manufacturing, processing, fabricating, or refining.

60. The Chicago Tribune Company's product, the *Chicago Tribune*, a daily newspaper, is tangible personal property and it is sold. These are the facts proved at trial. (Pl. Ex. 6 and 7; Tr. 37-40.) Consequently, the first requirement of the Manufacturing Exemption is met.

61. At trial, Defendants argued that the Chicago Tribune is really engaged in selling information, which, Defendants contend, is not tangible personal property. Defendants' position is untenable. It not only ignores the facts, but it also has been rejected by the Illinois Supreme Court, which held to the contrary with respect to such news publications as *Time* magazine in *Time, Inc.* v. *Hulman,* 31 Ill. 2d 344, 201 N.E.2d 374 (1964). That was an action challenging the assessment and collection of Retailers' Occupation Tax upon sales of magazines by plaintiffs who were publishers of the magazines.

61a. One of plaintiffs' arguments was that they were not engaged in the sale of tangible personal property. As the court noted, plaintiffs emphasized the aspect of their businesses involving the collection of news, short stories, features and other information and tried to minimize the fact that the finished product was sold as tangible personal property. The Supreme Court rejected that argument:

> We are of the opinion that the plaintiffs do not furnish a service to which the transfer of tangible personal property is merely incidental. The individual subscriber of plaintiffs' magazines receives no service other than that rendered in the retail sale of any item. The subscriber is not asked what news, short stories, features or

> other information he desires. He accepts plaintiffs' product as furnished or not at all. . . . *The sale of a magazine is essentially not different from the sale of a loaf of bread, or an automobile. While it is true that the utility or value of plaintiffs' magazines is in their content and not the paper and ink with which they are printed, the taxability of the transaction is not determined by weighing the value of the intangible properties of the item of sale, such as form, organization and design, against the value of its tangible properties, such as weight, size and texture.* . . . Nor are we persuaded by the argument advanced by some of the plaintiffs that they are not engaged in the business of selling at retail because the receipts from the sales of their magazines cover only 43% of the cost of printing and distributing them. . . . Liability for the tax does not depend upon the existence of a profit from the sale.

31 Ill. 2d at 349-51, 201 N.E.2d at 377 (emphasis supplied).

61b. This Court holds that the *Chicago Tribune* is tangible personal property which is sold.

62. As to the second prong of the Manufacturing Exemption, the foregoing Findings of Fact amply demonstrate that the Chicago Tribune's production process involves changes in the forms, uses and names of the constituent materials (ink of various colors, massive rolls of blank paper, and typed and graphic information assembled by the Chicago Tribune editorial staff) from which a newspaper is made. Defendants have offered no evidence to the contrary. Therefore, the second criterion of the Manufacturing Exemption is satisfied.

63. The third criterion is whether the Chicago Tribune is engaged in an activity which is "commonly regarded as assembling, manufacturing, processing, fabricating or refining." The Court holds that publishing the *Chicago Tribune* is an activity of the sort commonly regarded as manufacturing.

64. As described in the findings above, the process which results in the finished product known as the *Chicago Tribune* is a classic example of manufacturing as that term is commonly understood. Moreover, this is the settled majority position of other States on this issue and is, as well, the view of the United States Government Standard Industrial Classification Manual and the Illinois Department of Revenue materials cited above. The contrary assertion in the defendant Department of Revenue's regulation is plainly wrong.

65. A clear majority of the most recent and best reasoned court decisions which have considered the matter have held that newspaper printing is "manufacturing" under similar tax exemptions. The following cases have so held: *State* v. *Advertiser,* 257 Ala. 423, 59 So. 2d 576 (1952); *Advertiser Publishing Co.* v. *Fase,* 279 F.2d 636 (9th Cir. 1960) (Hawaii); *Garnett Publishing Co.* v. *Kirchner,* Kansas Tax Cases CCH 200-007 (District Court of Shawnee County, 1960); *State* v. *Dupre,* 42 La. Ann. 561, 7 So. 727 (1890); *Hearst Corporation (News American Division)* v. *State Department of Assessments & Taxation,* 269 Md. 625, 308 A.2d 679 (1973); *City of Pittsburgh* v. *Pittsburgh Press Co.,* 14 Pa. Commw. Ct. 551, 322 A.2d 390 (1974); and *McClure Newspapers, Inc.* v. *Department of Taxes,* 132 Vt. 169, 315 A.2d 451 (1974).

66. The vast majority of states which grant a similar exemption (or reduced tax rate) in respect of sales of machinery for manufacturing purposes have concluded, by administrative rule or statute, that newspaper printing qualifies for such exemption. The following states have so provided either by statute or regulation or both: Alabama, Idaho, Indiana, Kentucky, Maine, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, South

Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin and Wyoming.*

66a. In only two states is there relatively modern case law, not overruled or modified by statute or regulation, to the effect that printing is not always manufacturing: Missouri and Arkansas. *See Heidelberg Central, Inc.* v. *Director of Department of Revenue,* 476 S.W.2d 502 (Mo. 1972), and *Western Paper Co.* v. *Qualls,* 272 Ark. 369, 615 S.W.2d 369 (1981). This Court finds neither case persuasive here. Neither case involved publication of a newspaper. In the *Western Paper* case, moreover, the court held that commercial printing was not manufacturing for the purposes of the exemption contained in *Ark. Stat. Ann.* §841904(r)(2). In support of its decision, the Arkansas Supreme Court emphasized that commercial printers often produce

> a product which generally has no commercial value other than to the individual for whom the commercial printer performed the service. *'Ordinarily, we think of a manufactured article as something to be placed on the market for retail to the general public in the usual course of business.'*

272 Ark. at 469-70, 615 S.W.2d at 371 (emphasis supplied). On this basis, the Chicago Tribune would appear to be within the Arkansas Court's definition of a manufacturer and would receive the exemption.

67. The large majority of states that have considered the question — by statute, regulation or case law — are currently of the view that newspaper printing is manufacturing for the purposes of similar tax exemptions. The purpose of the Illinois Manufacturing Exemption is to prevent businesses from relocating elsewhere and to encourage them to

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* Two other states have specifically denied their manufacturing exemptions to newspapers: Florida, by a specific statutory provision (*Fla. Stat.* §218.08(5)(b)1, 2 and 5), and Georgia, by the promulgation of administrative rules. (Rules 560-12-2.75 and 560-12-2.77.)

open new or expanded facilities in Illinois. To this end, the Manufacturing Exemption should be read to reach those activities which receive favorable treatment elsewhere in order that Illinois be competitive with other states in this regard. The use of the phrase "commonly regarded as" indicates at least in part a legislative concern that the Manufacturing Exemption be given scope comparable to other states' exemptions and not be read narrowly. The majority position taken by other states should be accorded great weight here and, accordingly, the Court holds that the Manufacturing Exemption includes newspaper printing.

68. Finally, the Court takes notice of the fact that the principal objective of the legislature in enacting the Manufacturing Exemption was to encourage new or expanded industry in Illinois and to discourage the relocation of businesses out of the State.

69. It is apparent that, with modern communications technology and transportation, there is nothing so inherently "local" about the newspaper business as to set it apart from other manufacturing with regard to geographical location. Although a newspaper might have identification with a particular city or area, it is by no means necessary that the actual printing be done in that locale. For example, Plaintiffs introduced evidence that *The New York Times* is, in part, printed in a plant built in New Jersey. (Tr. 41.)

70. Even if an entire newspaper might not relocate, it might establish plants out of state or contract with out-of-state printers to print advertising supplements, weekly features and other materials produced in advance for insertion in the paper. Again, Plaintiffs introduced evidence that the Chicago Tribune's papers often contain such "outside prints." The Sunday comics, for example, are printed outside of Illinois. (Tr. 38-39.) And such large advertisers as Sears and K-Mart are almost totally free to have their advertising inserts printed anywhere. With its new plant, the Chicago Tribune can compete for some of this work. The position of

the Attorney General and the Defendants is contrary to this effort. (Tr. 42.)

71. Thus, the considerations of state policy which caused the legislature to create the Manufacturing Exemption are directly furthered by construing the Exemption to apply to sales to newspapers, the printing activities of which employ considerable numbers of people and are relatively free to move out of (or into) Illinois.

CONCLUSION

72. Newspaper printing is manufacturing within the meaning of the Manufacturing Exemption. The plain language of the Exemption encompasses sales of machinery and equipment to newspapers. There is no statutory basis for the view expressed in Article 2, Paragraph 9, of the Retailers' Occupation Tax Articles, *supra*, that printing a newspaper is not commonly regarded as manufacturing, processing, refining, fabricating or assembling. Therefore, Plaintiffs' purchases (and sales) of printing presses and other machinery and equipment used to produce the *Chicago Tribune* are entitled to the Exemption.

DECLARATORY JUDGMENT

Judgment in this action is hereby granted for Plaintiffs. Defendant Department of Revenue's Article 2, Paragraph 9, is expressly declared to be *ultra vires* and invalid insofar as newspaper production is concerned. The Protest Fund, together with all interest earned thereon, shall be ordered released to the Chicago Tribune Company and the Intervention Plaintiffs, as their respective interests appear.

ORDER

IT IS HEREBY ORDERED THAT Defendant Jerry Cosentino, Treasurer of the State of Illinois, release the Protest Fund in this action, together with the interest earned thereon, and pay to the Plaintiffs as follows:

I. To Chicago Tribune Company:

1. The sum of $54,725.37 plus interest earned from and after May 20, 1980.
2. The sum of $111,194.99 plus interest earned from and after June 27, 1980.
3. The sum of $35,531.84 plus interest earned from and after July 25, 1980.
4. The sum of $59,484.10 plus interest earned from and after August 22, 1980.
5. The sum of $66,622.19 plus interest earned from and after September 30, 1980.
6. The sum of $88,036.48 plus interest earned from and after October 31, 1980.
7. The sum of $55,841.83 plus interest earned from and after November 26, 1980.
8. The sum of $25,327.76 plus interest earned from and after December 31, 1980.
9. The sum of $111,302.02 plus interest earned from and after January 30, 1981.
10. The sum of $164,294.51 plus interest earned from and after February 27, 1981.
11. The sum of $169,959.56 plus interest earned from and after March 31, 1981.
12. The sum of $73,011.47 plus interest earned from and after April 30, 1981.

13. The sum of $45,208.75 plus interest earned from and after May 29, 1981.

14. The sum of $42,270.06 plus interest earned from and after June 30, 1981.

15. The sum of $117,641.77 plus interest earned from and after July 31, 1981.

16. The sum of $148,929.32 plus interest earned from and after August 31, 1981.

17. The sum of $53,265.89 plus interest earned from and after September 30, 1981.

18. The sum of $4,701.51 plus interest earned from and after October 30, 1981.

19. The sum of $133,617.34 plus interest earned from and after November 30, 1981.

20. The sum of $4,558.71 plus interest earned from and after December 31, 1981.

21. The sum of $3,195.56 plus interest earned from and after January 29, 1982.

22. The sum of $993.75 plus interest earned from and after February 24, 1982.

23. The sum of $4,326.46 plus interest earned from and after March 31, 1982.

24. The sum of $18,264.59 plus interest earned from and after June 30, 1982.

25. Any sums paid by Chicago Tribune Company into the Protest Fund after June 30, 1982 plus interest earned thereon from and after the dates of such payments.

II. To Acco Industries, Inc.:

1. The sum of $502.40 plus interest earned from and after July 31, 1981.

2. The sum of $529.58 plus interest earned from and after December 31, 1981.

3. Any sums paid by Acco Industries, Inc. into the Protest Fund after June 30, 1982 plus interest earned thereon from and after the dates of such payments.

III. To Arrow Electronics, Inc.:

1. The sum of $200.50 plus interest earned from and after April 30, 1981.

2. The sum of $6.06 plus interest earned from and after June 30, 1981.

3. Any sums paid by Arrow Electronics, Inc. into the Protest Fund after June 30, 1982 plus interest earned thereon from and after the dates of such payments.

IV. To Central Data Corporation:

1. The sum of $62.20 plus interest earned from and after October 31, 1981.

2. The sum of $9.45 plus interest earned from and after November 30, 1981.

3. The sum of $1.92 plus interest earned from and after December 31, 1981.

4. Any sums paid by Central Data Corporation into the Protest Fund after June 30, 1982 plus interest earned thereon from and after the dates of such payments.

V. To Rockwell Graphic Systems, Inc.:

1. The sum of $202,168 plus interest earned from and after January 31, 1981.

2. The sum of $23,872.95 plus interest earned from and after February 28, 1981.

3. The sum of $319,900.74 plus interest earned from and after June 30, 1981.

4. The sum of $82,489.99 plus interest earned from and after July 31, 1981.

5. The sum of $146.54 plus interest earned from and after December 31, 1981.

6. Any sums paid by Rockwell Graphic Systems, Inc. into the Protest Fund after June 30, 1982 plus interest earned thereon from and after the dates of such payments.

VI. To Ryco Graphic Manufacturing, Inc.:

1. The sum of $7,133.06 plus interest earned from and after September 30, 1981.

2. Any sums paid by Ryco Graphic Manufacturing, Inc. into the Protest Fund after June 30, 1982 plus interest earned thereon from and after the dates of such payments.

VII. To Signode Corporation:

1. The sum of $8,971.72 plus interest earned from and after August 31, 1981.

2. Any sums paid by Signode Corporation into the Protest Fund after June 30, 1982 plus interest earned thereon from and after the dates of such payments.

FURTHER ORDERED, that the rate of interest payable shall be the average rate of interest earned from time to time during the periods in question by all of the funds, whether held in the Protest Fund or not, invested by Defendant Cosentino on behalf of the State of Illinois.

FURTHER ORDERED, that, in the event that Defendants appeal, the Protest Fund shall continue to be invested and the interest earned thereby credited to the Protest Fund pending the final outcome of this case.

Joseph Wosik, Circuit Judge

Dated: August 18, 1982

ENTERED
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
AUGUST 18, 1982
JUDGE JOSEPH M. WOSIK
DEPUTY CLERK /s/

APPENDIX D

NO. 59453

IN THE

Supreme Court of Illinois

CHICAGO TRIBUNE COMPANY,

Plaintiff-Appellant,

and

ROCKWELL GRAPHIC SYSTEMS, INC.; ROCKWELL INTERNATIONAL CORPORATION; ACCO INDUSTRIES, INC.; ARROW ELECTRONICS, INC.; RYCO GRAPHIC MANUFACTURING, INC.; SIGNODE CORPORATION; AND

CENTRAL DATA CORPORATION,

Intervenor Plaintiffs-Appellants,

vs.

J. THOMAS JOHNSON, individually and as Director, Illinois Department of Revenue; and JERRY COSENTINO,

individually and as State Treasurer of Illinois; and THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Defendants-Appellees.

Appeal from the Appellate Court of Illinois, First District,

Fifth Division, Mejda, Wilson and Lorenz Justices.

No. 82-2129

There Heard on Appeal from the Circuit Court

of Cook County

No. 80 CH 3407

The Honorable Joseph M. Wosik *Judge Presiding*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Chicago Tribune Company; Rockwell Graphic Systems, Inc.; Rockwell International Corporation; Acco Industries, Inc.; Arrow Electronics, Inc.; Ryco Graphic Manufacturing, Inc.; Signode Corporation; and Central Data Corporation, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois herein, entered April 19, 1985, affirming the judgment of the Appellate Court of Illinois, First District, in No. 82-2129, which reversed the judgment for appellants of the Circuit Court of Cook County, Illinois, in No. 80 CH 3407.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Don H. Reuben
One of the Attorneys for Appellants

DATED: July 2, 1985

FILED Jul 3 - 1985

SUPREME COURT CLERK

Of Counsel:

Don H. Reuben
William G. Schopf, Jr.
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APPENDIX E

Relevant provisions of the Use Tax Act (Ill. Rev. Stat. ch. 120, § 439.1, 439.2 and 439.3, as amended effective January 1, 1980)

USE TAX ACT

AN ACT in relation to a tax upon the privilege of using tangible personal property in this State. Laws 1955, p. 2027, approved and eff. July 14, 1955. Title amended by Laws 1959, p. 654, approved and eff. July 8, 1959.

439.1. Title

§ 1. This Act shall be known and may be cited as the "Use Tax Act."

439.2. Definitions

§ 2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of such property in any form as tangible personal property in the regular course of business to the extent that such property is not first subjected to a use for which it was purchased, and does not include the use of such property by its owner for demonstration purposes: Provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or by-product of manufacturing. "Use" does not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property and does not mean the physical incorporation of tangible personal property, to the extent not first subjected to a use for which it was purchased, as an ingredient or constituent, into other tangible personal property (a) which is sold in the regular course of business or (b) which the person incorporating such ingredient or constituent therein has undertaken at the time of such

purchase to cause to be transported in interstate commerce to destinations outside the State of Illinois: Provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or by-product of manufacturing.

"Purchase at retail" means the acquisition of the ownership of or title to tangible personal property through a sale at retail.

"Purchaser" means anyone who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.

"Sale at retail" means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for a valuable consideration: Provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or by-product of manufacturing. For this purpose, slag produced as an incident to manufacturing pig iron or steel and sold is considered to be an intentionally produced by-product of manufacturing. "Sale at retail" includes any such transfer made for resale unless made in compliance with Section 2c of the Retailers' Occupation Tax Act[1] as incorporated by reference into Section 12 of this Act. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price are sales.

"Sale at retail" shall also be construed to include any Illinois florist's sales transaction in which the purchase order is received in Illinois by a florist and the sale is for use or consumption, but the Illinois florist has a florist in another

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1. All footnotes have been omitted.

state deliver the property to the purchaser or the purchaser's donee in such other state.

The purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of tangible personal property.

"Selling price" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property other than as hereinafter provided, and service, but not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold, and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever, but does not include interest or finance charges which appear as separate items on the bill of sale or sales contract nor charges that are added to prices by sellers on account of the seller's tax liability under the "Retailers' Occupation Tax Act," or on account of the seller's duty to collect, from the purchaser, the tax that is imposed by this Act, or on account of the seller's tax liability under Section 8-11-1 of the Illinois Municipal Code, as heretofore and hereafter amended, or on account of the seller's tax liability under the "County Retailers' Occupation Tax Act."

The phrase "like kind and character" shall be liberally construed (including but not limited to any form of motor vehicle for any form of motor vehicle, or any kind of farm or agricultural implement for any other kind of farm or agricultural implement), while not including a kind of item which, if sold at retail by that retailer, would be exempt from retailers' occupation tax and use tax as an isolated or occasional sale.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public

or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

"Retailer" means and includes every person engaged in the business of making sales at retail as defined in this Section.

A person who holds himself out as being engaged (or who habitually engages) in selling tangible personal property at retail is a retailer hereunder with respect to such sales (and not primarily in a service occupation) notwithstanding the fact that such person designs and produces such tangible personal property on special order for the purchaser and in such a way as to render the property of value only to such purchaser, if such tangible personal property so produced on special order serves substantially the same function as stock or standard items of tangible personal property that are sold at retail.

A person whose activities are organized and conducted primarily as a not-for-profit service enterprise, and who engages in selling tangible personal property at retail (whether to the public or merely to members and their guests) is a retailer with respect to such transactions, excepting only a person organized and operated exclusively for charitable, religious or educational purposes either (1), to the extent of sales by such person to its members, students, patients or inmates of tangible personal property to be used primarily for the purposes of such person, or (2), to the extent of sales by such person of tangible personal property which is not sold or offered for sale by persons organized for profit. The selling of school books and school supplies by schools at retail to students is not "primarily for the purposes of" the school which does such selling. This paragraph does not apply to nor subject to taxation occasional dinners, social or similar activities of a person organized and operated exclusively for charitable, religious or educational purposes, whether or not such activities are open to the public.

A person who is the recipient of a grant or contract under Title VII of the Older Americans Act of 1965 (P.L. 92-258) and serves meals to participants in the federal Nutrition Program for the Elderly in return for contributions established in amount by the individual participant pursuant to a schedule of suggested fees as provided for in the federal Act is not a retailer under this Act with respect to such transactions.

Persons who engage in the business of transferring tangible personal property upon the redemption of trading stamps are retailers hereunder when engaged in such business.

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail or a sale through a bulk vending machine does not make such person a retailer hereunder. However, any person who is engaged in a business which is not subject to the tax imposed by the "Retailers' Occupation Tax Act" because of involving the sale of or a contract to sell real estate or a construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased, and which does not become real estate, under any provision of a construction contract or real estate sale or real estate sales agreement entered into with some other person arising out of or because of such nontaxable business, is a retailer to the extent of the value of the tangible personal property so transferred. If, in such transaction, a separate charge is made for the tangible personal property so transferred, the value of such property, for the purposes of this Act, is the amount so separately charged, but not less than the cost of such property to the transferor; if no separate charge is made, the value of such property, for the purposes of this Act, is the cost to the transferor of such tangible personal property.

"Retailer maintaining a place of business in this State," or any like term, means and includes any retailer:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State.

"Bulk vending machine" means a nonelectrically operated vending machine, containing unsorted confections, nuts or other merchandise which, when a coin of a denomination not larger than one cent is inserted, are dispensed in equal portions, at random and without selection by the customer. Amended by P.A. 78-1121, §1, eff. Oct. 1, 1974; P.A. 78-1297, §40, eff. March 4, 1975.

439.3. Tangible personal property purchased at retail — Use tax — Rate — Collection and remittance — Exemptions

§ 3. A tax is imposed upon the privilege of using in this State tangible personal property, other than farm chemicals, purchased at retail from a retailer. Such tax is at the rate of 4¼% of the selling price of such property if purchased prior to October 1, 1969, and at the rate of 4% of the selling price of such property if purchased after September 30, 1969. If the property that is purchased at retail from a retailer is acquired outside Illinois and used outside Illinois before being brought to Illinois for use here and is nevertheless taxable hereunder, however, the "selling price" on which the tax is computed shall be reduced by an amount which represents a reasonable allowance for depreciation for the period of such prior out-of-state use.

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to Section 9 hereof.

The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to Section 10 hereof.

Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. The Department may adopt and promulgate reasonable rules and regulations for the adding of such tax by retailers to selling prices by prescribing bracket systems for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax.

If any seller collects use tax measured by receipts which are not subject to use tax, or if any seller, in collecting use tax measured by receipts which are subject to tax under this Act, collects more from the purchaser than the amount of the use tax on the transaction is, the purchaser shall have a legal right to claim a refund of such amount from the seller. However, if such amount is not refunded to the purchaser for any reason, the seller is liable to pay such amount to the Department. This paragraph does not apply to an amount collected by the seller as use tax on receipts which are subject to tax under this Act as long as such collection is made in compliance with the tax collection brackets prescribed by the Department in its Rules and Regulations.

The tax herein imposed does not apply to any governmental body, or to any corporation, society, association, foundation or institution organized and operated exclusively for charitable, religious or education purposes, or any not-for-profit corporation, society, association, foundation, institution or organization which has no compensated officers or

employees and which is organized and operated primarily for the recreation of persons 55 years of age or older, when using tangible personal property purchased at retail.

The tax imposed by this Act does not apply to the use of machinery and equipment primarily in the process of the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease, whether such sale or lease is made directly by the manufacturer or by some other person, whether the materials used in the process are owned by the manufacturer or some other person, or whether such sale or lease is made apart from or as an incident to the seller's engaging in the service occupation of producing machines, tools, dies, jigs, patterns, gauges or other similar items of no commercial value on special order for a particular purchaser. This exemption includes machinery and equipment which replaces machinery and equipment in an existing manufacturing facility as well as machinery and equipment which is for use in an expanded or new manufacturing facility. For the purposes of this exemption, each of these terms shall have the following meanings: (1) "manufacturing process" shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. In relation to a recognized integrated business composed of a series of operations which collectively constitute manufacturing, or individually constitute manufacturing operations, the manufacturing process shall be deemed to commence with the first operation or stage of production in the series, and shall not be deemed to end until the completion of the final product in the last operation or stage of production in the series; (2) "assembling process" shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal prop-

erty, by the combination of existing materials in a manner commonly regarded as assembling which results in a material of a different form use or name; (3) "machinery" shall mean major mechanical machines or major components of such machines contributing to a manufacturing or assembling process; and (4) "equipment" shall include any independent device or tool separate from any machinery but essential to an integrated manufacturing or assembly process; or any subunit or assembly comprising a component of any machinery or auxiliary, adjunct or attachment parts of machinery, such as tools, dies, jigs, fixtures, patterns and molds, but shall not include parts which require periodic replacement in the course of normal operation, nor hand tools. This exemption also includes the sale of materials to a purchaser who produces exempted types of machinery or equipment or tools and who rents or leases such machinery or equipment or tools to a manufacturer of tangible personal property. This exemption also includes the sale of materials to a purchaser who manufactures such materials into an exempted type of machinery or equipment or tools which such purchaser uses himself in the manufacturing of tangible personal property. This exemption includes the sale of exempted types of machinery or equipment to a purchaser who is not the manufacturer, but who rents or leases the use of such property to a manufacturer: Provided that this paragraph of this Section takes effect January 1, 1979, and shall apply to the proceeds of such sales qualifying under this Section according to the following schedule: (1) 31.25% of the proceeds of such sales made from January 1, 1979, through December 31, 1979; (2) 31.25% of the proceeds of such sales made from January 1, 1980, through December 31, 1980; (3) 56.25% of the proceeds of such sales made from January 1, 1981, through December 31, 1981; (4) 81.25% of the proceeds of such sales made from January 1, 1982, through December 31, 1982; (5) 93.75% of the proceeds of such sales made from January 1, 1983, through December 31, 1983; and (6) 100% of the proceeds of such sales made after December 31, 1983. The user of such machinery and equipment and tools must furnish to the

Department a certificate of exemption in the form prescribed by the Department setting forth such facts as may be necessary to support the exemption. Such certificates shall be submitted to the Department on a quarterly basis. The Department may not require duplicate submissions of such certificates, nor a separate certification of the exempt nature of a transaction from the seller, but shall provide by rule for a coordinated system for quarterly submission of such certificates under this Act and the other State use and occupation tax acts.

Such certificate of exemption shall also set forth the number of workers who are laid off or otherwise terminated, who are retained as employees, and who are newly employed as a direct result of the acquisition of the exempt machinery and equipment for which the exemption is claimed and the Department shall compile this information and make it available to the public on a quarterly basis.

Any informal rulings, opinions or letters issued by the Department in response to an inquiry or request for any opinion from any person regarding the coverage and applicability of this exemption to specific devices shall be published, maintained as a public record, and made available for public inspection and copying. If the informal ruling, opinion or letter contains trade secrets or other confidential information, where possible the Department shall delete such information prior to publication. Whenever such informal rulings, opinions, or letters contain any policy of general applicability, the Department shall formulate and adopt such policy as a rule in accordance with the provisions of the Illinois Administrative Procedure Act.

To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by such individual for his or her own

use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property by an interstate carrier for-hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property to interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by such interstate carriers for-hire;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other State;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing or shaping, and, as altered, is used solely outside this State;

(e) the temporary storage in this State of building materials and fixtures which are acquired either in this State or outside this State by an Illinois registered combination retailer and construction contractor, and which such purchaser thereafter uses outside this State by incorporating such property into real estate located outside this State;

(f) the use, in this State, of a motor vehicle which was sold in this State to a nonresident even though said motor vehicle is delivered to said nonresident in this State, if said motor vehicle is not to be titled in this State, and if a driveaway decal permit is issued to said motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code. The issuance of the

driveaway decal permit shall be prima facie evidence that said motor vehicle will not be titled in this State.

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State.

The tax imposed by this Act does not apply to the use, in this State, of tangible personal property which is acquired outside this State by a nonresident individual who then brings the property to this State for use here and who has used the property outside this State for at least 3 months before bringing the property to this State.

Where a business that is not operated in Illinois, but which does operate in another State, is moved to Illinois or opens up an office, plant or other business facility in Illinois, such business shall not be taxed on its use, in Illinois, of used tangible personal property which such business bought outside Illinois and used outside Illinois in the operation of such business for at least 3 months before moving such used property to Illinois for use here.

"Acquired outside this State," whenever used in this Section, in addition to its usual and popular meaning, includes the delivery, outside Illinois, of tangible personal property that is purchased in this State and delivered from a point in this State to the point of delivery outside this State.

The tax that is imposed by this Act also does not apply in a transaction in which the purchase order is received by a florist who is located outside Illinois, but who has a florist located in Illinois deliver the property to the purchaser or the purchaser's donee in Illinois.

Amended by P.A. 80-1292, §1, eff. Jan. 1, 1979; P.A. 81-440, §1, eff. Jan. 1, 1980; P.A. 81-530, §1, eff. Jan. 1, 1980; P.A. 81-991, §1, eff. Jan. 1, 1980.

APPENDIX F

Relevant Provisions of the Retailers' Occupation Tax Act (Ill. Rev. Stat. ch. 120, ¶440 and 441, as amended effective January 1, 1980)

RETAILERS' OCCUPATION TAX ACT

AN ACT in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption. Laws 1933, p. 924, approved June 28, 1933, eff. July 1, 1933.

440. Terms defined

§ 1. "Sale at retail" means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for a valuable consideration: Provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or byproduct of manufacturing. For this purpose, slag produced as an incident to manufacturing pig iron or steel and sold is considered to be an intentionally produced byproduct of manufacturing. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales.

"Sale at retail" shall be construed to include any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration, and to include any transfer, whether made for or without a valuable considera-

tion, for resale in any form as tangible personal property unless made in compliance with Section 2c of this Act.[1]

Sales of tangible personal property, which property, to the extent not first subjected to a use for which it was purchased, as an ingredient or constituent, goes into and forms a part of tangible personal property subsequently the subject of a "Sale at retail," are not sales at retail as defined in this Act: Provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or byproduct of manufacturing.

"Sale at retail" shall be construed to include any Illinois florist's sales transaction in which the purchase order is received in Illinois by a florist and the sale is for use or consumption, but the Illinois florist has a florist in another state deliver the property to the purchaser or the purchaser's donee in such other state.

The purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of tangible personal property.

A person whose activities are organized and conducted primarily as a not-for-profit service enterprise, and who engages in selling tangible personal property at retail (whether to the public or merely to members and their guests) is engaged in the business of selling tangible personal property at retail with respect to such transactions, excepting only a person organized and operated exclusively for charitable, religious or educational purposes either (1), to the extent of sales by such person to its members, students, patients or inmates of tangible personal property to be used primarily for the purposes of such person, or (2), to the extent of sales by such person of tangible personal property which is not sold or offered for sale by persons organized for profit. The selling of

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1. All footnotes have been omitted.

school books and school supplies by schools at retail to students is not "primarily for the purposes of" the school which does such selling. The provisions of this paragraph shall not apply to nor subject to taxation occasional dinners, socials or similar activities of a person organized and operated exclusively for charitable, religious or educational purposes, whether or not such activities are open to the public.

A person who is the recipient of a grant or contract under Title VII of the Older Americans Act of 1965 (P.L. 92-258) and serves meals to participants in the federal Nutrition Program for the Elderly in return for contributions established in amount by the individual participant pursuant to a schedule of suggested fees as provided for in the federal Act is not engaged in the business of selling tangible personal property at retail with respect to such transactions.

"Purchaser" means anyone who, through a sale at retail, acquires the ownership of or title to tangible personal property for a valuable consideration.

"Selling price" or the "amount of sale" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property, other than as hereinafter provided, and services, but not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold, and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever, but does not include charges that are added to prices by sellers on account of the seller's tax liability under this Act, or on account of the seller's duty to collect, from the purchaser, the tax that is imposed by the Use Tax Act, or on account of the seller's tax liability under Section 8-11-1 of the Illinois Municipal Code, as heretofore and hereafter amended, or on account of the seller's tax liability under the County Retailers' Occupation Tax Act or on account of the seller's tax liability under any tax imposed

under the "Regional Transportation Authority Act," approved December 12, 1973.

The phrase "like kind and character" shall be liberally construed (including but not limited to any form of motor vehicle for any form of motor vehicle, or any kind of farm or agricultural implement for any other kind of farm or agricultural implement), while not including a kind of item which, if sold at retail by that retailer, would be exempt from retailers' occupation tax and use tax as an isolated or occasional sale.

"Gross receipts" from the sales of tangible personal property at retail means the total selling price or the amount of such sales, as hereinbefore defined. In the case of charge and time sales, the amount thereof shall be included only as and when payments are received by the seller.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail or a sale through a bulk vending machine does not constitute engaging in business of selling such tangible personal property at retail within the meaning of this Act; provided that any person who is engaged in a business which is not subject to the tax imposed by this Act because of involving the sale of or a contract to sell real estate or a construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased, and which does not become real estate, under any provision of a construction contract or real estate sale or real estate sales agreement entered into with some other person arising out of or because of such nontaxable business, is engaged in the business of

selling tangible personal property at retail to the extent of the value of the tangible personal property so transferred. If, in such transaction, a separate charge is made for the tangible personal property so transferred, the value of such property, for the purpose of this Act, shall be the amount so separately charged, but not less than the cost of such property to the transferor; if no separate charge is made, the value of such property, for the purposes of this Act, is the cost to the transferor of such tangible personal property.

A person who holds himself out as being engaged (or who habitually engages) in selling tangible personal property at retail is a person engaged in the business of selling tangible personal property at retail hereunder with respect to such sales (and not primarily in a service occupation) notwithstanding the fact that such person designs and produces such tangible personal property on special order for the purchaser and in such a way as to render the property of value only to such purchaser, if such tangible personal property so produced on special order serves substantially the same function as stock or standard items of tangible personal property that are sold at retail.

Persons who engage in the business of transferring tangible personal property upon the redemption of trading stamps are engaged in the business of selling such property at retail and shall be liable for and shall pay the tax imposed by this Act on the basis of the retail value of the property transferred upon redemption of such stamps.

"Bulk vending machine" means a nonelectrically operated vending machine, containing unsorted confections, nuts or other merchandise which, when a coin of a denomination not larger than one cent is inserted, are dispensed in equal portions, at random and without selection by the customer. Amended by P.A. 78-1297, § 41, eff. March 4, 1975.

441. Imposition of tax — Exemptions — Collections by sellers

§ 2.A tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate of 4¼% of the gross receipts from such sales of tangible personal property made in the course of such business prior to October 1, 1969, and at the rate of 4% of the gross receipts from such sales after September 30, 1969, excluding, however, from those gross receipts, (a) the proceeds of sales of farm chemicals, (b) the proceeds of such sales to any governmental body, or to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes or any not-for-profit corporation, society, association, foundation, institution or organization which has no compensated officers or employee and which is organized and operated primarily for the recreation of persons 55 years of age or older, (c) the proceeds from sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce or lessors under leases of one year or longer executed or in effect at the time of purchase to interstate carriers for hire for use as rolling stock moving in interstate commerce, and (d) the proceeds from the sale of machinery and equipment which will be used by the purchaser, or a lessee of the purchaser, primarily in the process of manufacturing or assembling tangible personal property for wholesale or retail sale or lease, whether such sale or lease is made directly by the manufacturer or by some other person, whether the materials used in the process are owned by the manufacturer or some other person, or whether such sale or lease is made apart from or as an incident to the seller's engaging in the service occupation of producing machines, tools, dies, jigs, patterns, gauges or other similar items of no commercial value on special order for a particular purchaser. This exemption includes machinery and equipment which replaces machinery and equipment in an existing manufacturing facility as well as machinery and equipment which is for use in an expanded or new manufacturing facility. For the purposes of this exemption, each of

these terms shall have the following meanings: (1) "manufacturing process" shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. In relation to a recognized integrated business composed of a series of operations which collectively constitute manufacturing, or individually constitute manufacturing operations, the manufacturing process shall be deemed to commence with the first operation or stage of production in the series, and shall not be deemed to end until the completion of the final product in the last operation or stage of production in the series; (2) "assembling process" shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by the combination of existing materials in a manner commonly regarded as assembling which results in a material of a different form, use or name; (3) "machinery" shall mean major mechanical machines or major components of such machines contributing to a manufacturing or assembling process; and (4) "equipment" shall include any independent device or tool separate from any machinery but essential to an integrated manufacturing or assembly process; or any subunit or assembly comprising a component of any machinery or auxiliary, adjunct or attachment parts of machinery, such as tools, dies, jigs, fixtures, patterns and molds, but shall not include parts which require periodic replacement in the course of normal operation, nor hand tools. This exemption also includes the sale of materials to a purchaser who produces exempted types of machinery or equipment or tools and who rents or leases such machinery or equipment or tools to a manufacturer of tangible personal property. This exemption also includes the sale of materials to a purchaser who manufactures such materials

into an exempted type of machinery or equipment or tools such purchaser uses himself in the manufacturing of tangible personal property. Provided that exemption (d) in this Section takes effect January 1, 1979 and shall apply to the proceeds of such sales qualifying under this Section according to the following schedule: (1) 31.25% of the proceeds of such sales made from January 1, 1979, through December 31, 1979; (2) 31.25% of the proceeds of such sales made from January 1, 1980, through December 31, 1980; (3) 56.25% of the proceeds of such sales made from January 1, 1981, through December 31, 1981; (4) 81.25% of the proceeds of such sales made from January 1, 1982, through December 31, 1982; (5) 93.75% of the proceeds of such sales made from January 1, 1983, through December 31, 1983; and (6) 100% of the proceeds of such sales made after December 31, 1983. The seller of such machinery and equipment and tools must furnish to the Department a certificate of exemption from the purchaser in the form prescribed by the Department setting forth such facts as may be necessary to support the exemption. Such certificates shall be submitted to the Department on a quarterly basis. The Department may not require duplicate submissions of such certificates, nor a separate certification of the exempt nature of a transaction from the seller, but shall provide by rule for a coordinated system for quarterly submission of such certificates under this Act and the other State use and occupation tax acts.

Such certificate of exemption shall also set forth the number of workers who are laid off or otherwise terminated, who are retained as employees, and who are newly employed as a direct result of the acquisition of the exempt machinery and equipment for which the exemption is claimed and the Department shall compile this information and make it available to the public on a quarterly basis.

Any informal rulings, opinions or letters issued by the Department in response to an inquiry or request for any opinion from any person regarding the coverage and applicability of this exemption to specific devices shall be published,

maintained as a public record, and made available for public inspection and copying. If the informal ruling, opinion or letter contains trade secrets or other confidential information, where possible the Department shall delete such information prior to publication. Whenever such informal rulings, opinions, or letters contain any policy of general applicability, the Department shall formulate and adopt such policy as a rule in accordance with the provisions of the Illinois Administrative Procedure Act.

However, such tax is not imposed upon the privilege of engaging any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State, nor is such tax imposed on a transaction in which the purchase order is received by a florist who is located outside Illinois, but who has a florist located in Illinois deliver the property to the purchaser or the purchaser's donee in Illinois, nor is such tax imposed upon sales of fuel consumed or used in the operation of ships, barges or vessels which are used primarily in or for the transportation of property or the conveyance of persons for hire on rivers bordering on this State if such fuel is delivered by the seller to the purchaser's barge, ship or vessel while it is afloat upon such bordering river, nor is such tax imposed upon the sale of a motor vehicle in this State to a nonresident even though said motor vehicle is delivered to said nonresident in this State, if said motor vehicle is not to be titled in this State, and if a driveaway decal permit is issued to said motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code. The issuance of the driveaway decal permit shall be prima facie evidence that said motor vehicle will not be titled in this State.

If any seller collects an amount (however designated) which purports to reimburse such seller for retailers' occupation tax liability measured by receipts which are not subject to retailers' occupation tax, or if any seller, in collecting an amount (however designated) which purports to reimburse such seller for retailers' occupation tax liability measured by

receipts which are subject to tax under this Act, collects more from the purchaser than the seller's retailers' occupation tax liability on the transaction is, the purchaser shall have a legal right to claim a refund of such amount from such seller. However, if such amount is not refunded to the purchaser for any reason, the seller is liable to pay such amount to the Department. This paragraph does not apply to an amount collected by the seller as reimbursement for the seller's retailers' occupation tax liability on receipts which are subject to tax under this Act as long as such collection is made in compliance with the tax collection brackets prescribed by the Department in its Rules and Regulations.

Amended by P.A. 80-1292, §4, eff. Jan. 1, 1979; P.A. 81-439, §1, eff. Jan. 1, 1980; P.A. 81-530, §4, eff. Jan. 1, 1980; P.A. 81-991, §4, eff. Jan. 1, 1980.

APPENDIX G

1. Relevant Provisions of the Use Tax Graphic Arts Exemption (Ill. Rev. Stat. ch. 120, ¶ 439.3, as amended effective September 1, 1981)

439.3. Tangible personal property purchased at retail — Use tax — Rate — Collection and remittance — Exemptions

§ 3. A tax is imposed upon the privilege of using in this State tangible personal property, other than graphic arts machinery and equipment both new and used and including that manufactured on special order, certified by the purchaser to be used primarily for graphic arts production, and including in this exemption such machinery and equipment purchased for lease, other than farm chemicals, other than motor vehicles of the first division as defined in Section 1-146 of the "Illinois Vehicle Code" [1] which are used for automobile renting as defined in the "Automobile Renting Occupation and Use Tax Act," other than farm machinery and equipment costing $1,000 or more both new and used and including that manufactured on special order, certified by the purchaser to be used primarily for production agriculture, including any individual replacement part for such machinery and equipment which part costs in excess of $1,000, and including in this exemption such machinery and equipment purchased for lease and excluding from this exemption motor vehicles required to be registered pursuant to "The Illinois Vehicle Code," and other than proceeds of any mandatory service charge which is separately stated on customers' bills for purchase and consumption of food and beverages, if all of the proceeds of the service charge are in fact turned over to the employees who would normally have received tips had the service charge policy not been introduced, purchased at retail from a retailer. Such tax is at the rate of 4% of the selling price of such property. However with respect to gasohol, such tax

1. All footnotes have been omitted.

shall be imposed at the rate of 0% up to and including June 30, 1982, and at the rate of 1% from July 1, 1982 up to and including June 30, 1983, and at the rate of 2% from July 1, 1983 up to and including June 30, 1984, and at the rate of 3% from July 1, 1984 up to and including June 30, 1985, and at the rate of 4% on July 1, 1985 and thereafter. However, with respect to food for human consumption which is to be consumed off the premises where it is sold (other than alcoholic beverages and food which has been prepared for immediate consumption) and prescription and nonprescription medicines, drugs, medical appliances and insulin, urine testing materials, syringes, and needles used by diabetics, for human use, such tax shall be imposed at the rate of 3% for sales or purchases on and after January 1, 1980 and before January 1, 1981, and at the rate of 2% on and after January 1, 1981. If the property that is purchased at retail from a retailer is acquired outside Illinois and used outside Illinois before being brought to Illinois for use here and is nevertheless taxable hereunder, however, the "selling price" on which the tax is computed shall be reduced by an amount which represents a reasonable allowance for depreciation for the period of such prior out-of-state use.

For the purposes of this Section, "graphic arts production" means printing by one or more the common processes or graphic arts production services as those processes and services are defined in Major Group 27 of the U.S. Standard Industrial Classification Manual.

For purposes of this Section, "production agriculture" means the raising of or the propagation of: livestock; crops for sale for human consumption; crops for livestock consumption; the production seed stock grown for the propagation of feed grains and the husbandry of animals or, for the purpose of providing a food product, including the husbandry of blood stock as a main source of providing a food product. For purposes of this Section, "production agriculture" also means animal husbandry, floriculture, horticulture and viticulture.

As used in this Section "gasohol" means motor fuel containing at least 10% alcohol which alcohol contains no more than 1.25% water by weight and is obtained from agricultural products or by-products. Any person who knowingly sells or represents as gasohol any fuel which does not qualify as gasohol under this Act is guilty of a business offense and shall be fined not more than $100 for each day that such sale or representation takes place after notification from the Department of Agriculture that the fuel in question does not qualify as gasohol.

The exclusion as to graphic arts machinery and equipment in this Section takes effect September 1, 1981, and shall apply to the proceeds of such sales qualifying under this Section according to the schedule established for machinery and equipment used primarily in the process of manufacturing or assembling tangible personal property for wholesale or retail sale or lease.

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to Section 9 hereof.

The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to Section 10 hereof.

Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. The Department may adopt and promulgate reasonable rules and regulations for the adding of such tax by retailers to selling prices by prescribing bracket systems for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax.

If any seller collects use tax measured by receipts which are not subject to use tax, or if any seller, in collecting use tax

measured by receipts which are subject to tax under this Act, collects more from the purchaser than the amount of the use tax on the transaction is, the purchaser shall have a legal right to claim a refund of such amount from the seller. However, if such amount is not refunded to the purchaser for any reason, the seller is liable to pay such amount to the Department. This paragraph does not apply to an amount collected by the seller as use tax on receipts which are subject to tax under this Act as long as such collection is made in compliance with the tax collection brackets prescribed by the Department in its Rules and Regulations. Provided that the exclusion as to farm machinery and equipment in this Section takes effect September 1, 1980 and shall apply to the proceeds of such sales qualifying under this Section according to the following schedule: (1) 50% of the proceeds of such sales made from September 1, 1980, through August 31, 1982; (2) 100% of the proceeds of such sales made on and after September 1, 1982.

The tax herein imposed does not apply to an governmental body, or to any corporation, society, association, foundation or institution organized and operated exclusively for charitable, religious or educational purposes or any not-for-profit corporation, society, association, foundation, institution or organization which has no compensated officers or employees and which is organized and operated primarily for the recreation of persons 55 years of age or older, when using tangible personal property purchased at retail.

The tax imposed by this Act does not apply to the use of distillation machinery and equipment, sold as a unit or kit and assembled or installed by the retailer, which machinery and equipment is certified by the user to be used only for the production of ethyl alcohol that will be used for consumption as motor fuel or as a component of motor fuel for the personal use of such user and not subject to sale or resale. The exemption provided for in this paragraph takes effect September 1, 1981.

The tax imposed by this Act does not apply to the use of machinery and equipment primarily in the process of the

manufacturing or assembling of tangible personal property for wholesale or retail sale or lease, whether such sale or lease is made directly by the manufacturer or by some other person, whether the materials used in the process are owned by the manufacturer or some other person, or whether such sale or lease is made apart from or as an incident to the seller's engaging in the service occupation of producing machines, tools, dies, jigs, patterns, gauges or other similar items of no commercial value on special order for a particular purchaser. This exemption includes machinery and equipment which replaces machinery and equipment in an existing manufacturing facility as well as machinery and equipment which is for use in an expanded or new manufacturing facility. For the purposes of this exemption, each of these terms shall have the following meanings: (1) "manufacturing process" shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. In relation to a recognized integrated business composed of a series of operations which collectively constitute manufacturing, or individually constitute manufacturing operations, the manufacturing process shall be deemed to commence with the first operation or stage of production in the series, and shall not be deemed to end until the completion of the final product in the last operation or stage of production in the series; (2) "assembling process" shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by the combination of existing materials in a manner commonly regarded as assembling which results in a material of a different form, use or name; (3) "machinery" shall mean major mechanical machines or major components of such machines contributing to a manufacturing or assembling pro-

cess; and (4) "equipment" shall include any independent device or tool separate from any machinery but essential to an integrated manufacturing or assembly process; or any subunit or assembly comprising a component of any machinery or auxiliary, adjunct or attachment parts of machinery, such as tools, dies, jigs, fixtures, patterns and molds, but shall not include parts which require periodic replacement in the course of normal operation, nor hand tools. This exemption also includes the sale of materials to a purchaser who produces exempted types of machinery or equipment or tools and who rents or leases such machinery or equipment or tools to a manufacturer of tangible personal property. This exemption also includes the sale of materials to a purchaser who manufactures such materials into an exempted type of machinery or equipment or tools which such purchaser uses himself in the manufacturing of tangible personal property. This exemption includes the sale of exempted types of machinery or equipment to a purchaser who is not the manufacturer, but who rents or leases the use of such property to a manufacturer: Provided that this paragraph of this Section shall apply to the proceeds of such sales qualifying under this Section according to the following schedule: (1) 31.25% of the proceeds of such sales made on or after September 1, 1981 and prior to January 1, 1983; (2) 56.25% of the proceeds of such sales made on or after January 1, 1983 and prior to January 1, 1984; (3) 81.25% of the proceeds from such sales made on or after January 1, 1984 and prior to January 1, 1985; and (4) 100% of the proceeds of such sales made on or after January 1, 1985. The user of such machinery and equipment and tools shall prepare a certificate of exemption for each transaction stating facts establishing the exemption for that transaction, which certificate shall be available to the Department for inspection or audit. The Department shall prescribe the form of the certificate.

Any informal rulings, opinions or letters issued by the Department in response to an inquiry or request for any opinion from any person regarding the coverage and applicability of this exemption to specific devices shall be published,

maintained as a public record, and made available for public inspection and copying. If the informal ruling, opinion or letter contains trade secrets or other confidential information, where possible the Department shall delete such information prior to publication. Whenever such informal rulings, opinions, or letters contain any policy of general applicability, the Department shall formulate and adopt such policy as a rule in accordance with the provisions of the Illinois Administrative Procedure Act.

To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property to interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by such interstate carriers for-hire;

(c) the use, in this State, by owners, lessors, or shippers of tangible personal property which is utilized by interstate carriers for hire for use as rolling stock moving in interstate commerce as long as so used by interstate carriers for hire;

(d) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other State;

(e) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing or shaping, and, as altered, is used solely outside this State;

(f) the temporary storage in this State of building materials and fixtures which are acquired either in this State or outside this State by an Illinois registered combination retailer and construction contractor, and which such purchaser thereafter uses outside this State by incorporating such property into real estate located outside this State;

(g) the use or purchase of tangible personal property by a common carrier by rail which receives the physical possession of such property in Illinois, and which transports such property, or shares with another common carrier in the transportation of such property, out of Illinois on a standard uniform bill of lading showing the seller of the property as the shipper or consignor of such property to a destination outside Illinois, for use outside Illinois;

(h) the use, in this State, of a motor vehicle which was sold in this State to a nonresident, even though said motor vehicle is delivered to said nonresident in this State, if said motor vehicle is not to be titled in this State, and if a driveaway decal permit is issued to said motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code. 8 The issuance of the driveaway decal permit shall be prima facie evidence that said motor vehicle will not be titled in this State.

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act 9 despite all elements of the sale occurring in Illinois, then the

tax imposed by this Act shall not apply to the use of such tangible personal property in this State.

The tax imposed by this Act does not apply to the use, in this State, of tangible personal property which is acquired outside this State by a nonresident individual who then brings the property to this State for use here and who has used the property outside this State for at least 3 months before bringing the property to this State.

Where a business that is not operated in Illinois, but which does operate in another State, is moved to Illinois or opens up an office, plant or other business facility in Illinois, such business shall not be taxed on its use, in Illinois, of used tangible personal property which such business bought outside Illinois and used outside Illinois in the operation of such business for at least 3 months before moving such used property to Illinois for use here.

"Acquired outside this State" whenever used in this Section, in addition to its usual and popular meaning, includes the delivery, outside Illinois, of tangible personal property that is purchased in this State and delivered from a point in this State to the point of delivery outside this State.

The tax that is imposed by this Act also does not apply in a transaction in which the purchase order is received by a florist who is located outside Illinois, but who has a florist located in Illinois deliver the property to the purchaser or the purchaser's donee in Illinois.

Amended by P.A. 78-1135, § 1, eff. Oct. 1, 1974; P.A. 78-1297, § 58, eff. March 4, 1975; P.A. 79-946, § 1, eff. Oct. 1, 1975; P.A. 80-1292, § 1, eff. Jan. 1, 1979; P.A. 81-440, § 1, eff. Jan. 1, 1980; P.A. 81-530, § 1, eff. Jan. 1, 1980; P.A. 81-991, § 1, eff. Jan. 1, 1980; P.A. 81-1108, § 1, eff. Jan. 1, 1980; P.A. 81-1, 3rd Sp. Sess., § 1, eff. Jan. 1, 1980; P.A. 81-1378, § 1, eff. Jan. 1, 1981; P.A. 81-1379, § 2, eff. Aug. 12, 1980; P.A. 81-1509, Art. I, ¶76, eff. Sept. 26, 1980; P.A. 81-1513, § 1, eff. Dec. 3, 1980; P.A. 82-23, § 1, eff. Sept. 1, 1981; P.A. 82-24, § 1, eff. July 14, 1981; P.A. 82-665, § 1, eff. Nov. 3, 1981; P.A. 82-672, § 1, eff. Oct. 28, 1981; P.A. 82-683, § 1, eff. Nov. 12, 1981; P.A. 82-697, § 1, eff.

July 1, 1982; P.A. 82-703, § 9, eff. Jan. 1, 1982; P.A. 82-783, Art. III, § 58, eff. July 13, 1982; P.A. 82-1013, § 1, eff. Sept. 17, 1982. Retailers' Occupation Tax Graphic Arts Exemption (Ill. Rev. Stat. ch. 120, ¶441, as amended effective September 1, 1981.)

2. Relevant Provisions of the Retailers' Occupation Tax Graphic Arts Exemption (Ill. Rev. Stat. ch. 120, § 439.3, as amended effective September 1, 1981)

441. Imposition of tax — Exemptions — Collections by sellers

§ 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate of 4% of the gross receipts from such sales of tangible personal property made in the course of such business, excluding, however, from those gross receipts, (a) the proceeds of sales of farm chemicals and (a-1) Farm machinery and equipment costing $1,000 or more, both new and used, and including that manufactured on special order, certified by the purchaser to be used primarily for production agriculture, including any individual replacement part for such machinery and equipment which part costs in excess of $1,000, and including in his exemption such machinery and equipment purchased for lease and excluding from this exemption motor vehicles required to be registered pursuant to "The Illinois Vehicle Code," [1] (a-2) the proceeds from the sale of distillation machinery and equipment, sold as a unit or kit and assembled or installed by the retailer, which machinery and equipment is certified by the user to be used only for the production of ethyl alcohol that will be used for consumption as motor fuel or as a component of motor fuel for the personal use of such user and not subject to sale or resale, (a-3) graphic arts machinery and equipment, both new and used, including that manufactured on special order or purchased for lease, certified by the purchaser to be used primarily for graphic arts production, (a-4) the proceeds from the sales of motor vehi-

1. All footnotes have been omitted.

cles of the first division, as defined in Section 1-146 of the "Illinois Vehicle Code," which are used for automobile renting as defined in the "Automobile Renting Occupation and Use Tax Act," (b) the proceeds of such sales to any governmental body, or to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes or any not-for-profit corporation, society, association, foundation, institution or organization which has no compensated officers or employees and which is organized and operated primarily for the recreation of persons 55 years of age or older, (c) the proceeds from sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce or lessors under leases of one year or longer executed or in effect at the time of purchase to interstate carriers for hire for use as rolling stock moving in interstate commerce, (c-1) the proceeds from sales to owners, lessors or shippers of tangible personal property which is utilized by interstate carriers for hire for use as rolling stock moving in interstate commerce, (d) the proceeds from the sale of machinery and equipment which will be used by the purchaser, or a lessee of the purchaser, primarily in the process of manufacturing or assembling tangible personal property for wholesale or retail sale or lease, whether such sale or lease is made directly by the manufacturer or by some other person, whether the materials used in the process are owned by the manufacturer or some other person, or whether such sale or lease is made apart from or as an incident to the seller's engaging in the service occupation of producing machines, tools, dies, jigs, patterns, gauges or other similar items of no commercial value on special order for a particular purchaser, (e) the proceeds of any mandatory service charge which is separately stated on customers' bills for purchase and consumption of food and beverages, if all of the proceeds of the service charge are in fact turned over to the employees who would normally have received tips had the service charge policy not been introduced, (f) the proceeds from sale of any petroleum products to a purchaser if the seller is prohibited

by federal law from charging tax to such purchaser, and (g) the proceeds from the sale of tangible personal property to a common carrier by rail which receives the physical possession of such property in Illinois, and which transports such property, or shares with another common carrier in the transportation of such property, out of Illinois on a standard uniform bill of lading showing the seller of the property as the shipper or consignor of such property to a destination outside Illinois, for use outside Illinois. Exemption (d) includes machinery and equipment which replaces machinery and equipment in an existing manufacturing facility as well as machinery and equipment which is for use in an expanded or new manufacturing facility. For purposes of exemption (a-1), "production agriculture" means the raising of or the propagation of: livestock; crops for sale for human consumption; crops for livestock consumption; the production seed stock grown for the propagation of feed grains and the husbandry of animals or, for the purpose of providing a food product, including the husbandry of blood stock as a main source of providing a food product. For purposes of exemption (a-1), "production agriculture" also means animal husbandry, floriculture, horticulture and viticulture. For purposes of exemption (a-3), "graphic arts production" means printing by one or more the common processes or graphic arts production services as those processes and services are defined in Major Group 27 of the U.S. Standard Industrial Classification Manual. For the purposes of exemption (d), each of these terms shall have the following meanings: (1) "manufacturing process" shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. In relation to a recognized integrated business composed of a series of operations which collectively constitute manufacturing, or individually constitute manufacturing

operations, the manufacturing process shall be deemed to commence with the first operation or stage of production in the series, and shall not be deemed to end until the completion of the final product in the last operation or stage of production in the series; (2) "assembling process" shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by the combination of existing materials in a manner commonly regarded as assembling which results in a material of a different form, use or name; (3) "machinery" shall mean major mechanical machines or major components of such machines contributing to a manufacturing or assembling process; and (4) "equipment" shall include any independent device or tool separate from any machinery but essential to an integrated manufacturing or assembly process; or any subunit or assembly comprising a component of any machinery or auxiliary, adjunct or attachment parts of machinery, such as tools, dies, jigs, fixtures, patterns and molds, but shall not include parts which require periodic replacement in the course of normal operation, nor hand tools. Exemption (d) also includes the sale of materials to a purchaser who produces exempted types of machinery or equipment or tools and who rents or leases such machinery or equipment or tools to a manufacturer of tangible personal property. Exemption (d) also includes the sale of materials to a purchaser who manufactures such materials into an exempted type of machinery or equipment or tools which such purchaser uses himself in the manufacturing of tangible personal property. Provided that exemption (d) in this this Section shall apply to the proceeds of such sales qualifying under Section according to the following schedule: (1) 31.25% of the proceeds of such sales made on or after September 1, 1981 and prior to January 1, 1983; (2) 56.25% of the proceeds of such sales made on or after January 1, 1983 and prior to January 1, 1984; (3) 81.25% of the proceeds from such sales made on or after January 1, 1984 and prior to January 1, 1985; and (4) 100% of the proceeds of such sales

made on or after January 1, 1985. The purchaser of such machinery and equipment and tools shall furnish to the seller a certificate of exemption for each transaction stating facts establishing the exemption for that transaction, which certificate shall be available to the Department for inspection or audit. Provided that the exclusion in paragraph (a-1) of this Section takes effect September 1, 1980, and shall apply to the proceeds of such sales qualifying under paragraph (a-1) of this section according to the following schedule; (1) 50% of the proceeds of such sales made from September 1, 1980, through August 31, 1982; (2) 100% of the proceeds of such sales made on and after September 1, 1982.

Any informal rulings, opinions or letters issued by the Department in response to an inquiry or request for any opinion from any person regarding the coverage and applicability of this exemption to specific devices shall be published, maintained as a public record, and made available for public inspection and copying. If the informal ruling, opinion or letter contains trade secrets or other confidential information, where possible the Department shall delete such information prior to publication. Whenever such informal rulings, opinions, or letters contain any policy of general applicability, the Department shall formulate and adopt such policy as a rule in accordance with the provisions of the Illinois Administrative Procedure Act. However with respect to gasohol, such tax shall be imposed at the rate of 0% up to and including June 30, 1982, and at the rate of 1% from July 1, 1982 up to and including June 30, 1983, and at the rate of 2% from July 1, 1983 up to and including June 30, 1984, and at the rate of 3% from July 1, 1984 up to and including June 30, 1985, and at the rate of 4% on July 1, 1985 and thereafter.

As used in this Section "gasohol" means motor fuel containing at least 10% alcohol which alcohol contains no more than 1.25% water by weight and is obtained from agricultural products or by-products. Any person who knowingly sells or represents as gasohol any fuel which does not qualify as gasohol under this Act is guilty of a business offense and shall be fined not more than $100 for each day that such sale or

representation takes place after notification from the Department of Agriculture that the fuel in question does not qualify as gasohol.

Exemption (1-2) of this Section takes effect September 1, 1981.

Exemption (a-3) of this Section takes effect September 1, 1981, and shall apply to the proceeds of such sales qualifying under paragraph (a-3) of this Section according to the schedule established for machinery and equipment as established in the first paragraph of this Section.

However, with respect to food for human consumption which is to be consumed off the premises where it is sold (other than alcoholic beverages and food which has been prepared for immediate consumption) and prescription and nonprescription medicines, drugs, medical appliances and insulin, urine testing materials, syringes, and needles used by diabetics, for human use, such tax shall be imposed at the rate of 3% for sales or purchases on and after January 1, 1980 and before January 1, 1981, and at the rate of 2% on and after January 1, 1981. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State, nor is such tax imposed on a transaction in which the purchase order is received by a florist who is located outside Illinois, but who has a florist located in Illinois deliver the property to the purchaser or the purchaser's donee in Illinois, nor is such tax imposed upon sales of fuel consumed or used in the operation of ships, barges or vessels which are used primarily in or for the transportation of property or the conveyance of persons for hire on rivers bordering on this State if such fuel is delivered by the seller to the purchaser's barge, ship or vessel while it is afloat upon such bordering river, nor is such tax imposed upon the sale of a motor vehicle in this State to a nonresident even though said motor vehicle is delivered to said nonresident in this State, if said motor vehicle is not to be titled in this State, and if a

driveaway decal permit is issued to said motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code. The issuance of the driveaway decal permit shall be prima facie evidence that said motor vehicle will not be titled in this State.

If any seller collects an amount (however designated) which purports to reimburse such seller for retailers' occupation tax liability measured by receipts which are not subject to retailers' occupation tax, or if any seller, in collecting an amount (however designated) which purports to reimburse such seller for retailers' occupation tax liability measured by receipts which are subject to tax under this Act, collects more from the purchaser than the seller's retailers' occupation tax liability on the transaction is, the purchaser shall have a legal right to claim a refund of such amount from such seller. However, if such amount is not refunded to the purchaser for any reason, the seller is liable to pay such amount to the Department. This paragraph does not apply to an amount collected by the seller as reimbursement for the seller's retailers' occupation tax liability on receipts which are subject to tax under this Act as long as such collection is made in compliance with the tax collection brackets prescribed by the Department in its Rules and Regulations.

Amended by P.A. 79-946, § 2, eff. Oct. 1, 1975; P.A. 80-1292, § 4, eff. Jan. 1, 1979; P.A. 81-439, § 1, eff. Jan. 1, 1980; P.A. 31-530, § 4, eff. Jan. 1, 1980; P.A. 81-991, § 4, eff. Jan. 1, 1980; P.A. 81-1108, § 4, eff. Jan. 1, 1980; P.A. 81-1, 3rd Sp. Sess., § 4, eff. Jan. 1, 1980; P.A. 81-1378, § 4, eff. Jan. 1, 1981; P.A. 81-1379, § 1, eff. Aug. 12, 1980; P.A. 81-1509, Art. I, § 79, eff. Sept. 26, 1980; P.A. 81-1513, § 4, eff. Dec. 3, 1980; P.A. 82-23, § 2, eff. Sept. 1, 1981; P.A. 82-24, § 4, eff. July 14, 1981; P.A. 82-665, § 4, eff. Nov. 3, 1981; P.A. 82-672, § 4, eff. Oct. 28, 1981; P.A. 82-683, § 4, eff. Nov. 12, 1981; P.A. 82-697, § 4, eff. July 1, 1982; P.A. 82-703, § 10, eff. Jan. 1, 1982; P.S. 82-783, Art. III, § 61, eff. July 13, 1982; P.A. 82-1013, § 4, eff. Sept. 17, 1982; P.A. 82-1057, Art. III, § 13, eff. Feb. 11, 1983.

No. 85-204

Supreme Court, U.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO TRIBUNE COMPANY, ROCKWELL GRAPHIC SYSTEMS, INC., ROCKWELL INTERNATIONAL CORPORATION; ACCO INDUSTRIES, INC.; ARROW ELECTRONICS, INC.; RYCO GRAPHIC MANUFACTURING, INC.; SIGNODE CORPORATION; and CENTRAL DATA CORPORATION,

Appellants,

vs.

J. THOMAS JOHNSON, individually and as Director, Illinois Department of Revenue; and JERRY CONSENTINO, individually and as State Treasurer of Illinois; and THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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QUESTION PRESENTED

Will a review of the opinion and judgment of the Illinois Supreme Court present a reexamination of the facts rather than a substantial federal question?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO TRIBUNE COMPANY, ROCKWELL GRAPHIC SYSTEMS, INC., ROCKWELL INTERNATIONAL CORPORATION; ACCO INDUSTRIES, INC.; ARROW ELECTRONICS, INC.; RYCO GRAPHIC MANUFACTURING, INC.; SIGNODE CORPORATION; and CENTRAL DATA CORPORATION,

Appellants,

VS.

J. THOMAS JOHNSON, individually and as Director, Illinois Department of Revenue; and JERRY CONSENTINO, individually and as State Treasurer of Illinois; and THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

A REVIEW OF THE OPINION AND JUDGMENT OF THE ILLINOIS SUPREME COURT WILL PRESENT A REEXAMINATION OF THE FACTS RATHER THAN A SUBSTANTIAL FEDERAL QUESTION.

It is well established that the United States Supreme Court will exercise its jurisdiction to review substantial federal questions, and will not review a judgment of a

state court merely on questions of fact. *Grayson v. Harris*, 267 U.S. 352 (1925); *Portland R. Co. v. Railroad Commission*, 229 U.S. 397 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952). The only questions presented by the denial of the machinery and equipment exemption from use tax to Tribune are factual in nature and cannot be characterized as substantial federal questions.

A.

The Basis For The Denial Of The Use Tax Exemption

The Illinois Use Tax Act imposes a tax "upon the privilege of using in this state tangible personal property . . . ." Ill.Rev.Stat., 1979, Ch. 120, ¶439.3. It is conceded by Tribune that the purchase and use of printing presses and other equipment in its business of publishing newspapers constitutes the use of tangible personal property in this State, and as such is taxable. Tribune argues, however, that no use tax is due on its purchase and use of machinery and equipment used to make its newspaper because it is exempt from use tax by the terms of the machinery and equipment exemption contained in the Use Tax Act.

The machinery and equipment Use Tax Exemption under consideration provides that,

> The tax imposed by this Act does not apply to the use of machinery and equipment primarily in the process of manufacturing or assembling of tangible personal property for wholesale or retail sales, or lease . . . . Ill.Rev.Stat., 1981, Ch. 120, ¶439.3.

The exemption goes on to provide that,

> For the purposes of this exemption, each of these terms shall have the following meanings: (1) "manufacturing process" shall mean the production of any

> article of tangible personal property . . . by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. Ill.Rev.Stat., 1981, Ch. 120, ¶439.3.

The literal import of the foregoing Use Tax Exemption is that machinery and equipment must be employed in a manufacturing process that results in the production of tangible personal property for sale or lease in order to qualify for exemption from taxation.

Both the Retailers' Occupation Tax Act, Ill.Rev.Stat., Ch. 120, ¶440 and the Use Tax Act, Ch. 120, ¶439.2 indicate that newspapers produced by printing presses do not constitute tangible personal property for sale or lease in the following language:

> The purchase, employment and transfer of such tangible personal property as newsprint and ink for the purpose of conveying news (with or without other information) is not a purchase, use, or sale of tangible personal property.

The Tribune uses the machinery and equipment for which it seeks exemption from use tax to transform newsprint and ink into newspapers for the purpose of conveying news. Wayne Perry, the Tribune's Vice President and Director of Production, testified that Tribune's business consists of selling newspapers and that newspapers contain information. Similarly, Thomas O'Donnell, the Tribune's General Manager, testified that Tribune is in the business of gathering and disseminating the news in the form of a newspaper. Clearly then, Tribune is a business which "employs" and "transfers" to its readers "newsprint and ink for the primary purpose of conveying the news." When it does so the newspaper produced which

conveys the news is not "tangible personal property" according to the literal import of the definitional exclusions contained in paragraph 439.2 of the Use Tax Act and paragraph 440 of the Retailers' Occupation Tax Act. Because the newspaper produced is not "tangible personal property" the machinery and equipment used to produce it does not qualify for the machinery and equipment exemption contained in the Use Tax Act. The fact that Tribune does not qualify for the machinery and equipment exemption presents neither equal protection nor freedom of the press problems.

B.

Equal Protection

The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity to reference to composition, use or value.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-27 (1959).

Tribune argues that its failure to qualify for the machinery and equipment exemption results in a denial of equal protection of the law because publishers of newspapers are the sole class of manufacturers which are excluded from the benefit of the use tax exemption. Tribune's equal protection argument is without merit.

First, Tribune does not qualify for the machinery and equipment use tax exemption because it fails to bring itself within the literal terms of the exemption. The exemption by its literal terms is afforded to a class of manufacturers which use machinery to produce tangible personal property. Tangible personal property when sold by this class of manufacturers is subject to retailers' occupation tax. The Illinois legislature by excluding newspapers from the definition of tangible personal property effectively exempted publishers from the payment of retailers' occupation taxes on the sale of newspapers because the retailers' occupation tax operates on the sale of tangible personal property and a newspaper is not tangible personal property by statutory definition. Since Tribune does not produce tangible personal property which is sold subject to retailers' occupation tax it does not fit within the class which is afforded the use tax exemption.

No equal protection problem arises when one class of business such as Tribune is treated differently than another dissimilar class of business.

> The test of equal protection of the laws is whether the legislation in question operates equally on all persons in the class to which it applies and not whether the class is treated the same as another class.
>
> *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill.2d 323, 330, 265 N.E.2d 640 (1970).

Since the use tax exemption for machinery and equipment "operates equally on all persons in the class to which it

applies", i.e. manufacturers who produce tangible personal property subject to retailers' occupation tax, it is of no consequence that it does not apply to Tribune because Tribune is not within that class.

Although there is no equal protection problem incurred because the use tax exemption does not apply to Tribune's business of publishing newspapers, there would be serious equal protection problems created by affording Tribune the benefit of the use tax exemption.

If this court holds that equal protection is offended because Tribune does not qualify for the use tax exemption for machinery and equipment it uses to produce newspapers, then Tribune will be the only business afforded the exemption which does not produce tangible personal property subject to the retailers' occupation tax. Clearly, all members of the class who qualify for the exemption are required to produce tangible personal property which is sold subject to retailers' occupation tax. These class members will be discriminated against if they have to satisfy this requirement of producing tangible personal property subject to retailers' occupation tax and Tribune does not. More importantly, however, Tribune will be afforded special favorable tax treatment over all other purchasers of machinery and equipment who do not produce tangible personal property subject to retailers' occupation tax with their machinery and equipment. Tribune will be entitled to exemption from use tax for its machinery and equipment, but the others will not.

For example, the provision which was added to both the Retailers' Occupation Tax Act and the Use Tax Act in 1961 which states that "newsprint and ink for the primary purpose of conveying news . . . shall not be deemed to be a purchase, use or sale of tangible personal property" was passed by the Illinois legislature to eliminate

an inequity which existed between the electronic media and the print media. The preamble to that piece of legislation indicates that it was passed because "the General Assembly desires to prevent discrimination against newspapers and in favor of competing news-conveying agencies that do not transfer tangible personal property . . ." *Time, Inc. v. Hulman*, 31 Ill.2d 344, 201 N.E.2d 374, 376 (1964). The preamble goes on to say in essence that both the newspaper publishers and the electronic media are in the business of conveying the news. Newspaper publishers, however, use newsprint and ink—tangible matter—to convey the news while the electronic media convey the news without the use of any tangible matter. Because the newspaper publishers use tangible matter to convey the news, the legislature was aware of the fact that their medium of conveying news, i.e. newspapers, would be subject to retailers' occupation tax while the medium employed by the electronic media, i.e. radio and television, would not. The "newsprint and ink" language was passed, therefore, to ensure that there would be no discrimination in favor of electronic media and against newspapers by eliminating the possibility that any retailers' occupation tax would be charged on the sale of newspapers simply because newspapers have tangible characteristics. The "newsprint and ink" language ensures that both the electronic media and newspapers will be treated the same for retailers' occupation tax purposes—neither will pay taxes—because they are in the same class of business.

If, however, this Court accepts Tribune's argument that it is entitled to exemption from use tax for its machinery and equipment, it will have a use tax advantage that its counterparts in the electronic media do not enjoy. The electronic media does not transfer tangible matter with the news it conveys. The news from radio and television

goes out over the airwaves which are intangible in character. Thus, the machinery and equipment used by the electronic media to convey the news, i.e. cameras, sound equipment, etc., will not qualify for exemption from use tax because they do not produce tangible personal property subject to retailers' occupation tax. Thus, even though both Tribune and the other electronic media are in the business of conveying the news without the use of tangible matter—in Tribune's case through the statutory exclusion for "newsprint and ink"—only Tribune will qualify for an exemption from use tax for its machinery and equipment employed to convey the news. The "newsprint and ink" exclusion was passed by the Illinois legislature to eliminate this kind of discrimination.

Thus, there will be equal protection problems presented by this case only if this Court determines that Tribune qualifies for the machinery and equipment exemption because Tribune will be treated more favorably than any other member of the news conveying class to which it belongs.

C.

Freedom Of The Press

Tribune also argues, citing *Grossjean v. American Press Co.*, 297 U.S. 233 (1936), that a tax which rests solely upon the business of publishing newspapers violates the first amendment's guarantee of freedom of the press. While the appellees agree with the statement of the general principle there is no special tax imposed upon the publishers of newspapers in this case. Rather, there is a statute of general application which creates an exemption from use tax for machinery and equipment used to produce tangible personal property subject to retailers'

occupation tax. The fact that Tribune fails to come within the literal ambit of the use tax exemption does not create any first amendment difficulties.

In regard to its first amendment argument, Tribune places primary reliance upon the United States Supreme Court's opinion in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In that case Minnesota imposed a special use tax on paper and ink which would apply only to publications protected by the first amendment. The Illinois Appellate Court in rejecting Tribune's first amendment argument correctly noted:

> That case [*Minneapolis Star & Tribune Co.*] is inapposite to the instant case, however, because Minnesota "has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. [citation omitted]. The statute at issue in the case *sub judice* is a general statute which applies to all enterprises.
>
> * * *
>
> In summary, the exemption for manufacturing of tangible personal property does not apply to plaintiff because, as a matter of law, its operations do not produce tangible property. This holding does not conflict with the proscriptions of the First Amendment.
>
> *Chicago Tribune Co. v. Johnson*, 119 Ill.App.3d 270, 456 N.E.2d 356 (1984).

The Illinois Appellate Court's reasons for rejecting Tribune's first amendment argument are equally applicable here. Tribune's right to freedom of the press is not infringed by its denial of an exemption from use tax for machinery and equipment used to produce newspapers because the statutory exemption from use tax is general in its application to all enterprises which fall within its

ambit. The fact that Tribune fails to meet the terms of the statutory exemption from use tax does not result in a denial of Tribune's right to freedom of the press.

CONCLUSION

For the foregoing reasons the appellees respectfully urge this Honorable Court to dismiss the cause or to affirm the opinion and judgment of the Illinois Supreme Court, holding that Tribune is not entitled to use tax exemption for machinery and equipment used to produce newspapers.

Respectfully submitted,

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IN THE

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ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY TO APPELLEES' MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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Illinois has conceded, by its silence in the motion to dismiss:

(1) That its use tax on machinery and equipment fell on the Chicago Tribune but no other manufacturer of personal property;

(2) That the legislative debates that resulted in the statute at issue here disclose marked animus towards newspapers generally and the Chicago Tribune in particular;[1]

(3) That no compelling state interest was served by the two-year tax window that ensnared what must be the

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[1] In reaching its decision that newspapers were not "tangible personal property," the Illinois Supreme Court, per Justice Ward, reviewed the legislative debates, relying upon selected observations and comments of the legislators to justify holding that a newspaper is not "tangible personal property." Justice Ward, however, made no reference to the statements in the same debates that reflect hostility towards the press and the Chicago Tribune. (App. A at 4a-5a.) Justice Ward wrote:

> It is of course fundamental that in statutory construction a court will seek to determine the legislative intendment. . . . The legislative history or background of a statute may be instructive in ascertaining the intent of the legislature. . . . It is appropriate to do so here to determine whether the legislature, in light of the newsprint exemption, intended that printing presses were to be considered "machinery . . . primarily [used] in the process of the manufacturing . . . of tangible personal property." (*Id.* at 4a (citations omitted).)

On October 3, 1985, in a slip decision adversely affecting the right of the Chicago Cubs, a sister company of the Chicago Tribune, to play night baseball in Wrigley Field, *Chicago National League Ball Club, Inc. v. Thompson*, ____ Ill. 2d ____ (1985) (Docket No. 61630), Justice Ward wrote:

> To support this contention, the Cubs would have us consider comments made in the legislature and city council which the Cubs say sustain their claim that the motive for enacting the statute and ordinance was to prohibit night games at Wrigley Field only and not at other stadia or parks. The contention, however, even if gratuitously assumed to be true, does not have legislative relevance. The plaintiff does not charge that either enactment is ambiguous or that the legislative intention is unclear. ***When the language of a statute or ordinance is clear courts will give effect to the legislation without resort to unnecessary means of statutory interpretation, such as comments by legislators.*** (Slip opinion, at 4-5 (citation omitted).)

largest capital investment in history by an Illinois newspaper; and

(4) That the practical effect of this Illinois tax scheme is the same as the Minnesota "trade-off" tax held unlawful by this Court in 1983 in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983).

Moreover, Illinois never even addresses here the proposition that approval of the tax technique it adopted to impose a special tax on newspaper presses is an unconstitutional taxing strategy and should be so declared now to preclude further such excesses.

Illinois contends that review here will involve "a reexamination of the facts and not a substantial federal question." (*See* Motion To Dismiss, at 1-2.) The facts require no reexamination; they are totally undisputed. The State conducted no discovery, presented no witnesses, and filed no post-trial or post-judgment motions during proceedings in the trial court. On appeal, the State did not question any of the trial court's findings of fact. The Illinois Appellate and Supreme Courts accepted the factual findings of the trial court and neither party disputes those findings here.

Rather, this appeal squarely raises the constitutionality of a statutory interpretation made by the state appellate courts below that the Chicago Tribune is not entitled to an exemption for its tools of manufacturing when that exemption is granted to all other manufacturers similarly situated. Whether a state statute as interpreted by the state courts violates the First Amendment's guarantee of a free press is most plainly a substantial federal question. (*See* Jurisdictional Statement, at 3.)

The whole thrust of the State's argument is that the Illinois use tax exemption applies only to "machinery and equipment used to produce tangible personal property *subject to retailers'*

occupation tax." (Emphasis added.) (*See* Motion To Dismiss, at 8-9 (as to freedom of the press); *see also id.* at 5-6 (as to equal protection).) That precise justification for levying a "trade-off" tax on newspapers specially, as occurred here, was explicitly constitutionally rejected by the Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, supra,* 460 U.S. at 588-90. (*See* Jurisdictional Statement, at 16-17.)

Nor would allowing the Chicago Tribune the use tax exemption for its presses deny equal protection to the electronic media. The electronic media do not manufacture anything and there is nothing unlawfully discriminatory in treating all manufacturers differently from all non-manufacturers.[2] In any event, the suggestion that the first amendment proscription against taxing newspapers specially should yield to equal protection concerns regarding radio and television is incorrect.

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[2] The State argues that, since equipment used by television and radio broadcasters to convey news is subject to use tax, newspaper presses too should be "use taxed" because both newspapers and broadcasters convey news. In fact, many printers and many television and radio stations do not convey news. Under the State's argument, the equipment of all such non-news printers *and* broadcasters would be exempt from the Illinois use tax.

CONCLUSION

For these reasons and all those set forth in appellants' Jurisdictional Statement, the Court should now note probable jurisdiction and, after hearing, reverse.

Respectfully submitted,

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